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No. _____

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Due Process Clause of the Fourteenth Amendment requires a state to provide a clear and certain remedy for taxes collected in violation of federal law. After petitioner had pursued a common law action for refund under Missouri law and had successfully challenged a municipal tax under the Commerce Clause, Missouri courts decided as a matter of first impression that a Missouri tax protest statute, Mo. Rev. Stat. § 139.031, applies to municipal taxes and is the exclusive method for seeking a refund. Because petitioner had not paid the municipal taxes under protest, the decision invalidating the tax was vacated and petitioner was denied all relief. The questions presented are as follows:

1. Whether Missouri has refused to follow recent decisions by this Court holding that a state must provide a clear and certain remedy for unlawful taxation.

2. Whether the requirement that a state provide a clear and certain remedy for unlawful taxation is inapplicable whenever a state interprets its remedial procedures as a matter of first impression.

RULE 29.1 LISTING

Petitioner General Motors Corporation has no parent corporation. The subsidiaries of petitioner General Motors Corporation (except wholly-owned subsidiaries) are set forth in Appendix Q, *infra*, at 84a.

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CITY OF KANSAS CITY, MISSOURI,

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PETITION FOR A WRIT OF CERTIORARI

General Motors Corporation respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District,[1] in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals (App., *infra*, 1a) is reported at 895 S.W.2d 59. The orders of the

[1] As used in this petition, "Missouri Court of Appeals" or "court of appeals" at all times refers to the Missouri Court of Appeals, Western District.

Missouri Court of Appeals and Missouri Supreme Court denying rehearing and transfer (App., *infra*, 40a-41a) are unreported. The original decision of the Missouri Court of Appeals in favor of petitioner (App., *infra*, 13a) is unreported.

JURISDICTION

The judgment of the Missouri Court of Appeals, Western District, was entered on January 10, 1995. App., *infra*, 1a. The court of appeals denied a timely motion for rehearing on February 28, 1995. App., *infra*, 41a. On April 25, 1995, the Missouri Supreme Court denied petitioner's application for transfer to the Missouri Supreme Court. App., *infra*, 40a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. Amend. XIV, § 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. § 139.031.1[2]

1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.

STATEMENT

Petitioner General Motors Corporation ("GM") brought this common law action for a refund against respondent City of Kansas City, Missouri ("City") alleging that the City's occupation license tax violated the Commerce Clause. The trial court upheld GM's right to pursue a common law action for refund but rejected GM's arguments on the merits and entered summary judgment for the City. In its original decision, the Missouri Court of Appeals reversed on the merits, finding the municipal tax as applied to GM violated the Commerce Clause. The Missouri Supreme Court vacated that decision and remanded the case to the court of appeals for reconsideration in light of a new Missouri Supreme Court decision announcing that a protest procedure contained in a Missouri tax statute, Mo. Rev. Stat. § 139.031, applies to municipal taxes. The Missouri Court of Appeals then

[2] The full text of section 139.031 appears in Appendix J, *infra*, at 44a.

issued a new decision denying all relief to GM for failure to pay its municipal taxes under protest.

A. GM and the City's Occupation License Tax

From 1928 until 1988, GM operated the Leeds Assembly Plant in Kansas City, Missouri, where component parts were assembled into completed automobiles. From 1985 through 1988, virtually all such component parts were manufactured outside Kansas City.

Under the "transfer price" accounting system utilized by GM, each component part or service was assigned a value based upon cost, and the transfer price of a completed automobile was the sum of the transfer price of all component parts and services plus an allocation for plant operating costs. Leeds did not receive the sales proceeds from automobiles assembled at the facility.

Pursuant to ordinance, the City imposed an occupation license tax computed on the basis of annual gross receipts, business or commissions of all entities doing business in the City. With respect to Leeds, the City collected an occupation license tax based on the transfer price of completed vehicles without any allocation or other adjustment for the value of components manufactured elsewhere. From 1985 through 1988, GM paid occupation license taxes to the City totaling approximately $3.33 million.

B. Proceedings Below

On December 29, 1989, GM filed a common law action against the City for refund of occupation license

taxes paid from 1985 to 1988, together with prejudgment interest. GM asserted that the City's collection of the tax with respect to Leeds violated the Commerce Clause of the United States Constitution as well as state and municipal laws. The City moved for dismissal, arguing that GM had failed to pay the taxes under protest as required by Mo. Rev. Stat. § 139.031. The trial court denied the motion, holding that "Section 139.031 does not apply to Cities." App., *infra*, 39a. The trial court later found the tax did not violate the Commerce Clause or other law, entered summary judgment for the City, and certified its decision on GM's refund claim as final for appeal.[3] App., *infra*, 35a-38a.

In its opinion filed February 22, 1994, the Missouri Court of Appeals agreed with the trial court that the tax protest procedures in section 139.031 did not apply to municipal taxes. App., *infra*, 18a-21a. The court based this conclusion on available precedent, "the plain and ordinary meaning of the language of § 139.031 and the overall statutory scheme of Missouri tax laws." *Id.* at 21a. Although finding no case law directly on point, the court noted that a prior decision by the Missouri Supreme

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[3] The trial court never made a decision on a counterclaim for additional taxes made by the City, and there has been no further litigation on the counterclaim. GM's federal due process claim is final and reviewable by this Court because it "will survive and require decision regardless of the outcome" of any future proceedings on the unrelated counterclaim. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). *Accord American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 n.7 (1980) ("fact that these other claims are nonfinal, however, need not preclude us from considering the final determination as to" a claim that has been fully litigated).

Court[4] had declared that subsection 5 of section 139.031 applies only to county collectors; moreover, all other cases interpreting section 139.031 "consistently involve protests filed by taxpayers paying taxes collected by county collectors." *Id.* at 20a. The court also found the organization of the Missouri statutes to be significant:

> [T]he overall legislative scheme of Missouri tax laws demonstrates that Chapter 139 is inapplicable to cities. The statutes included in Chapters 89 through 99, RSMo, are uniquely applicable to cities. Chapters 92, 93 and 94 specifically relate to taxation by cities. . . . In contrast, the statutes contained in Chapters 136 to 141 apply to the collection of state and county taxes.

Id. at 20a-21a. Finally, the court observed that "the administrative procedure for protesting the payment of taxes requires the filing of a timely and proper appeal of the protested tax with the state tax commission," but the commission's authority "does not extend to city taxes." *Id.* at 20a. Finding section 139.031 inapplicable, the court of appeals concluded it "obviously does not act as a bar to GM's recovery." *Id.* at 21a.

Proceeding to the merits of GM's claim, the Missouri Court of Appeals then reversed the trial court and found that the City's occupation license tax, as applied to GM, violated the Commerce Clause. The tax imposed on the full transfer price of assembled automobiles lacked "external consistency" and discriminated against interstate commerce because it was not properly apportioned

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[4] *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. banc 1988).

so as to tax only that portion of GM's manufacturing process occurring within the City. *Id.* at 27a-32a. The court reversed summary judgment for the City and remanded to the trial court with leave for GM to amend its common law claim for a refund to expressly allege that GM paid the taxes under duress. *Id.* at 32a-33a.

Upon motion by the City, the Missouri Supreme Court on August 15, 1994 accepted transfer of the case, vacated the decision, and retransferred it to the court of appeals for reconsideration in light of the supreme court's decision issued that same day in *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. banc 1994). App., *infra*, 11a. In *Armco*, the supreme court had invalidated a municipal tax under state law, declaring it "void and unenforceable *ab initio*"; the court then went on to announce, for the first time, that the protest provisions of section 139.031 apply to municipal taxes. 883 S.W.2d at 7-8. The *Armco* dicta rejected the City's position in that case that the protest procedure did not apply to municipalities. *Id.*

Upon remand, GM sought leave to submit additional briefing establishing that GM's federal right to due process of law would be violated if section 139.031 were applied in this case. App., *infra*, 76a-83a. The Missouri Court of Appeals denied GM's request (*id.* at 42a-43a), and on January 10, 1995, the court issued a new opinion denying all relief to GM because GM had not paid the license taxes under protest:

> In *Armco*, the Supreme Court addressed an issue of first impression, interpreting § 139.031 as it believed the legislature intended all along. *Armco*, 883 S.W.2d at 7-8. The court did not

> change an earlier interpretation on the issue of city tax collection; nor did the legislature enact a new statute which the court is attempting to apply retroactively. Parties are presumed to know the law and cannot normally avoid an act or deed on the ground that they were ignorant of the law. . . . GM had a duty to comply with § 139.031. It failed to satisfy this duty and cannot now claim ignorance as an excuse.

895 S.W.2d at 62; App., *infra*, 8a. Moving one step beyond *Armco*, the court of appeals then concluded that section 139.031 is an exclusive remedy that precluded GM's common law action for refund. 895 S.W.2d at 62-63; App., *infra*, 9a-10a. Thus, the court found it unnecessary to reach the Commerce Clause issues.

On February 28, 1995, the court of appeals summarily denied GM's motion for rehearing or transfer to the Missouri Supreme Court, and on April 25, 1995, the supreme court likewise summarily denied GM's application for transfer. App., *infra*, 40a-41a.

C. How the Federal Question Was Presented

On three separate occasions, GM asserted that the Due Process Clause of the Fourteenth Amendment prohibited application of the *Armco* interpretation of section 139.031 so as to bar GM's claim for refund. Each time, Missouri courts rejected GM's contention without permitting full briefing or oral argument.

GM first raised the argument shortly after *Armco* was decided and this case was remanded to the court of appeals for reconsideration. In its motion to supplement

the record, to file additional briefs and to reargue the case, filed with the court of appeals on September 8, 1994, GM cited this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and asserted "that the due process clause of the United States Constitution requires that when a state collects illegal taxes, it must provide a 'clear and certain remedy' by which a taxpayer may obtain 'meaningful relief.' " App., *infra*, 78a. The Missouri Court of Appeals denied GM's motion. App., *infra*, 42a-43a.

After the Missouri Court of Appeals issued its decision denying the refund claim, GM moved for rehearing by the court of appeals or alternatively for transfer to the Missouri Supreme Court. App., *infra*, 58a-75a. GM argued that it was being denied due process of law in violation of the Fourteenth Amendment and that the decision barring GM's claim for refund based on a new interpretation of section 139.031 was equivalent to the "bait and switch" tactics this Court had just condemned in *Reich v. Collins*, 115 S. Ct. 547 (1994). App., *infra*, 65a-73a. The Missouri Court of Appeals summarily denied GM's motion for rehearing and application for transfer. *Id.* at 41a.

Finally, GM renewed its federal due process claim in an application for transfer filed directly with the Missouri Supreme Court, again emphasizing the recent *Reich* decision. App., *infra*, 48a-57a. GM's application for transfer was summarily denied. *Id.* at 40a.

Where, as here, an intervening court decision supplies "a new and unexpected basis for a claim by the defeated party of the denial of a federal right," the federal claim is properly asserted and preserved when first

raised on motion for rehearing. *Great N. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1932). For example, in tax refund cases, this Court has repeatedly considered due process arguments first raised after an unexpected adverse decision. *Reich*, 115 S. Ct. at 549; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930). Thus, GM's federal due process claim is properly preserved for review on writ of certiorari.

REASONS FOR GRANTING THE WRIT

In several recent decisions, this Court has emphasized that the Due Process Clause requires a state to "provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) (footnote and citation omitted). Stated even more emphatically, the Due Process Clause prohibits a state from reconfiguring its remedial scheme for unlawful taxation "unfairly, in *midcourse* – to 'bait and switch,' as some have described it." *Reich v. Collins*, 115 S. Ct. 547, 550 (1994) (emphasis in original). By their actions in this case, Missouri courts have refused to follow these precedents, thereby testing the resolve of this Court to enforce its federal constitutional decisions as the law of the land.

In an era of tight budgets, state and local governments face constant temptation to pursue creative and aggressive methods to retain tax revenues – even those collected in violation of the Constitution. The very existence of this case in its present posture so soon after the *Reich* decision is compelling evidence that some jurisdictions have yet to heed this Court's recent pronouncements that a state must provide a clear and certain remedy for unlawful taxation. *Cf. Craig v. Harney*, 331 U.S. 367, 368 (1947) (certiorari granted "because of the importance of the problem and because the ruling of the Texas court raised doubts whether it conformed to the principles announced" in two recent decisions). Allowing the decision below to stand will encourage Missouri and other states to continue to exact and retain unconstitutional taxes with little fear of federal oversight.

Even apart from these fundamental issues of federalism and federal supremacy, this case raises the important question of whether *McKesson* and *Reich* can be ignored any time a state construes its tax remedies as a matter of first impression. Although *McKesson*, *Reich* and other recent decisions seem to suggest there is no "first impression" exception to the requirement of a clear and certain remedy for unlawful taxation, those decisions do not squarely address the issue; on the other hand, at least one earlier decision by the Court suggests such an exception may exist. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 n.9 (1930) (if remedial statute had never been construed by state's highest court, taxpayer would have had to assume the risk of unfavorable interpretation). This uncertainty undermines the effectiveness of

McKesson and *Reich* and encourages states to evade the obligation to provide a clear and certain remedy.

In sum, the decision below is either an affront or an evasion. Under either scenario, it shows that the Court's recent work in this area remains unfinished. Accordingly, certiorari should be granted to maintain the vitality of *Reich, McKesson* and similar cases upholding the due process rights of taxpayers.

I. The Missouri Court Of Appeals Has Refused To Follow The Controlling Decision Of This Court In *Reich*.

In *Reich*, federal retirees sought refunds from Georgia for income taxes imposed on their pension benefits in violation of the constitutional intergovernmental tax immunity doctrine. Those retirees sought relief under a Georgia refund statute seemingly applicable on its face; however, the Georgia Supreme Court then declared the statute inapplicable and concluded that the retirees should have pursued predeprivation remedies that were no longer available to them. *Reich*, 115 S. Ct. at 548-50. This Court rejected the Georgia court's reliance on predeprivation procedures because "no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." *Id.* at 550 (emphasis in original). In the absence of any Georgia cases placing "any limiting construction on the [refund] statute's sweeping language," the "average taxpayer" was entitled to take the state's law at face value. *Id.*

The history of this case shows that *Reich* was not an isolated incident of bait-and-switch tactics. An average Missouri taxpayer prior to the *Armco* opinion would have reasonably concluded (as did GM, the trial judge, and three appellate judges in this case) that the tax protest procedures set forth in section 139.031 did not apply to municipal taxes. The provision is not codified in the statutory chapters governing municipal taxation; instead, it is found in a chapter governing county and state taxation. App., *infra*, 20a-21a. Section 139.031 establishes an administrative appeal procedure to the state tax commission – a body having no authority over city taxes. *Id.* at 20a. No case prior to *Armco* had ever applied section 139.031 to municipal taxes; to the contrary, the available precedents suggested it did not apply to cities. *See Crest Communications v. Kuehle*, 754 S.W.2d 563, 567-68 (Mo. banc 1988) (subsection 5 of section 139.031 applies only to taxes paid to county collectors; recognizing action for refund of city taxes in case where taxes were not paid under protest). Indeed, as the court of appeals observed in its original decision, "cases other than Crest Communications which interpret § 139.031 consistently involve protests filed by taxpayers paying taxes collected by county collectors." App., *infra*, 20a. In any event, the statute is phrased in permissive terms ("taxpayer *may* protest") and was not regarded as an exclusive remedy:

> It does not appear . . . that the legislature intended to abrogate those remedies existing prior to the enactment of sec. 139.031 nor to make the procedure set forth in sec. 139.031 the exclusive remedy available to a taxpayer.

John Calvin Manor, Inc. v. Aylward, 517 S.W.2d 59, 63 (Mo. 1974) (suggesting section 139.031 was enacted to give taxpayers the option to seek a refund without proving payment under duress). *See also Naegele Outdoor Advertising Co. v. Kansas City*, 509 S.W.2d 128, 130 (Mo. 1974) (discussing tax protest procedure under municipal ordinance; right to refund is not conditioned upon the filing of a protest).

The bait-and-switch tactics began only after GM had obtained a favorable appellate ruling on its Commerce Clause challenge. While the decision favorable to GM was pending on the City's motion for transfer to the Missouri Supreme Court, that court issued its decision in *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. banc 1994), which stated for the first time that the tax protest procedure set forth in section 139.031 does apply to municipal taxes. Ironically, the City had argued in the *Armco* case that the protest procedures did *not* apply – a position diametrically opposed to the City's position in this case. Moreover, even though the finding that the challenged taxing ordinance was void and unenforceable *ab initio* should have sufficed to end the *Armco* controversy, the supreme court reached out to opine on the tax protest question. *Id.* at 7-8. The court plainly took this unnecessary action with an eye to GM's pending refund action, which the *Armco* opinion cites in a footnote. *Id.* at 8 n.5.

On remand, and brushing aside GM's objections, the Missouri Court of Appeals completed the bait-and-switch maneuver by holding that section 139.031 as newly interpreted in *Armco* not only applied to this case but was also GM's exclusive remedy. 895 S.W.2d at 62-63; App., *infra*,

9a-10a. Accordingly, because GM had lacked the clairvoyance to pay its taxes under protest, the court denied GM any relief whatsoever – just as the Georgia court in *Reich* denied relief because the taxpayer had not pursued predeprivation remedies that had never before been regarded as exclusive. Despite these substantially equivalent facts, the court of appeals decided this case and denied rehearing without even mentioning *Reich* or other due process decisions by this Court. *See* App., *infra*, 1a-10a, 41a.

Because Missouri courts repeatedly elevate fiscal expediency over federal law, it is imperative that this Court grant certiorari to vindicate the constitutional rights of Missouri taxpayers and to deter other states from emulating Missouri's practices. As recently as 1994, this Court granted certiorari to reverse the Missouri Supreme Court's decision that the Commerce Clause could tolerate some discrimination against interstate commerce as a matter of administrative convenience. *Associated Indus. of Missouri v. Lohman*, 114 S. Ct. 1815 (1994). Even more to the point are two Depression-era cases illustrating that Missouri courts have long used bait-and-switch tactics to deny refunds to taxpayers. In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), a Missouri taxpayer sought relief in equity without complaining to the state tax commission, based on a prior Missouri Supreme Court opinion stating it was "preposterous" and "unthinkable" that the commission had any power in such cases. *Id.* at 676. On appeal, the Missouri Supreme Court then overruled its prior decision and denied equitable relief to the taxpayer for failure to pursue a legal remedy before the tax commission, even

though it was "too late for the plaintiff to avail itself of the newly found remedy." *Id.* at 677. This Court reversed because the taxpayer had not "been accorded due process in the primary sense":

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-82. During the same term, this Court also decided *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930), which reversed an unexpected decision of the Missouri Supreme Court imposing a tax on United States bonds.

For whatever reason, the message of *Reich* is not reaching Missouri courts, and this Court needs to send the message again for the benefit of taxpayers everywhere. The history of *Reich* shows that states can be selectively deaf when taxpayer rights hinder state fiscal interests, and this case shows some states may be profoundly deaf. Because what happened here is in all practical respects indistinguishable from *Reich*, GM suggests that summary disposition without full briefing and argument would be an efficient and forceful means of communication.

II. Certiorari Should Be Granted To Clarify Whether The Requirement Of A Clear And Certain Remedy For Unlawful Taxation Applies Whenever A State Construes Its Remedial Procedures As A Matter Of First Impression.

If this case is not squarely controlled by *Reich*, then it raises an important question regarding the precise scope of *Reich*, *McKesson* and similar cases – namely, whether the requirement that a state provide a clear and certain remedy for unlawful taxation applies to cases construing state remedial procedures as a matter of first impression. *Reich* and other recent decisions can be read to preclude a "first impression" exception to the requirement of a clear and certain remedy. On the other hand, this Court's opinion in *Brinkerhoff-Faris* contains language suggesting that due process may permit states to leave taxpayers guessing until the highest state court defines remedial procedures as a matter of first impression. This case affords the Court an opportunity to clarify or reconcile its prior opinions by deciding whether a state can avoid its obligation to provide a clear and certain remedy any time it announces a decision of first impression. To leave this important question unanswered will encourage states to continue testing the limits of recent precedents, thereby undermining a taxpayer's constitutional right to due process.

This question was not presented in *Reich* because the case involved an unfair *reconfiguration* of state refund procedures rather than a decision of first impression. 115 S. Ct. at 550. By contrast, the Missouri Court of Appeals characterized *Armco* as announcing a legal configuration in existence ever since section 139.031 was enacted (albeit

so obscure as to defy prior recognition by taxpayers and judges alike):

> In *Armco*, the Supreme Court addressed an issue of first impression, interpreting § 139.031 as it believed the legislature intended all along. . . . The court did not change an earlier interpretation on the issue of city tax collection; nor did the legislature enact a new statute which the court is attempting to apply retroactively.

895 S.W.2d at 62; App., *infra*, 8a.[5] By means of this characterization, the court avoided deciding whether the *Armco* interpretation of section 139.031 could fairly be applied retroactively to bar GM's claim; instead, the court simply blamed the outcome on GM's supposed ignorance of the law. The result in this case thus illustrates how the constitutional requirement of a clear and certain remedy could be effectively circumvented or nullified by an exception for decisions of first impression.

For purposes of due process, a newly defined remedial procedure should be indistinguishable from a redefined remedial procedure. Where a state's highest court has broken with past precedent on the remedial procedures available to taxpayers, this Court has plainly

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[5] As discussed above, there were many inferences to be drawn from both the statute and case law suggesting that section 139.031 did *not* apply to municipal taxes, but no case had ever squarely faced the issue; hence, the characterization of *Armco* as a decision of first impression seems to be technically correct. *Cf. Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1754 (1995) (Kennedy, J., concurring in judgment) (a case merely applying existing precedent does not decide an issue of first impression).

held that the new interpretation of state law cannot be invoked to deny relief to a taxpayer who complied with the law as previously interpreted. *Reich*, 115 S. Ct. at 550-51; *Brinkerhoff-Faris*, 281 U.S. at 677-82. Where a taxpayer can only rely on something less than a definitive pronouncement by a state's highest court – such as lower court decisions or the statute itself – such reliance is obviously reasonable and entitled to due process protection.

Recent decisions by this Court strongly indicate that the existence of a clear and certain remedy must be tested from the taxpayer's perspective as of the time the taxes are paid without reference to subsequent legal developments; whether such developments involve matters of first impression should therefore be immaterial to a taxpayer's constitutional rights. *McKesson*, for example, recognized the possibility that a state "may invoke, as an independent basis for refusing to provide a refund, petitioner's failure to comply with a notice requirement *that was in effect at the time of petitioner's tax payments.*" 496 U.S. at 24 n.4 (emphasis added). Also, in discussing the many options available to a state in developing a remedial scheme that protects the state's legitimate fiscal interests, *McKesson* repeatedly refers to the implementation of such measures solely on a prospective basis. *Id.* at 45 ("A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern *with respect to future cases.*") (emphasis added); *id.* ("The State's ability *in the future* to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful

tax.") (emphasis added); *id.* at 50 ("And *in the future,* States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation . . . . ") (emphasis added).

Reich also supports the proposition that a state's duty to provide a clear and certain remedy is judged as of the time taxes were paid or the taxpayer otherwise had to determine the proper course of action. *See* 115 S. Ct. at 550 (discussing prevailing notions of Georgia law during the 1980's as viewed through the eyes of an average taxpayer). Most recently, in *Reynoldsville Casket,* the Court explained how a state might deny relief for unlawful taxation if based on "a *pre-existing,* separate, independent rule of state law." 115 S. Ct. at 1750 (emphasis added). If a murky or imperceptible rule of state law is regarded as "pre-existing" merely because a state court retroactively declares it as such, then the requirement of a clear and certain remedy would be illusory in many cases.

Although recent decisions by the Court seem to preclude denial of taxpayer relief based on a novel or unexpected interpretation of state procedures, a concluding footnote in *Brinkerhoff-Faris* suggests that a state's interpretation of its tax refund procedures as a matter of first impression may not be constrained by the due process requirement of a clear and certain remedy:

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.

281 U.S. at 682 n.9. The continued vitality of this statement is questionable after *Reich* and other cases, yet *Reich* favorably cites *Brinkerhoff-Faris* in connection with the proposition that due process protects " 'those who, in justified reliance upon *prior decisions*, seek vindication in state courts of their federal constitutional rights.' " 115 S. Ct. at 551 (emphasis added) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)). This passage could be read as implying that a taxpayer's constitutional right to a clear and certain remedy somehow depends upon the existence of prior decisions regarding the remedy.

The broad language and emphatic tone of *Reich* and other recent decisions should be read to prohibit retroactive application of a novel and unexpected interpretation of state tax refund procedures, regardless of whether such interpretation can be characterized as a decision of first impression. A state's obligation to provide a clear and certain remedy necessarily includes an obligation to maintain such a remedy at all times. Otherwise, states would be free to enact ambiguous or inscrutable procedures that could be "clarified" to the state's advantage as a matter of first impression whenever the first lucrative and otherwise meritorious refund action comes along. To the extent *McKesson*, *Reich* and other recent decisions by this Court do not foreclose the risk of fiscal opportunism left open by *Brinkerhoff-Faris*, certiorari should be granted to resolve this important question and reinforce *McKesson* and *Reich*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL SCOTT KELLY, JR.
Counsel of Record

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APPENDIX A

GENERAL MOTORS CORPORATION,
Appellant,

v.

CITY OF KANSAS CITY,
Missouri, Respondent.

Nos. WD 46246, WD 46526.

Missouri Court of Appeals,
Western District.

Jan. 10, 1995.

Motion for Rehearing and/or Transfer to Supreme Court Denied Feb. 28, 1995.

Application to Transfer Denied
April 25, 1995.

Paul S. Kelly, Gage and Tucker, Kansas City, for appellant.

George L. Debitetto, Asst. City Atty., Kansas City, Respondent.

Before ULRICH, P.J., and BRECKENRIDGE and HANNA, JJ.

BRECKENRIDGE, Judge.

General Motors Corporation (GM) appeals from the trial court's order granting summary judgment in favor of the City of Kansas City (City) on GM's claims seeking recovery of occupation license taxes which GM alleges were illegally assessed by Kansas City against GM. GM raises five points on appeal arguing that the trial court erred in granting the City summary judgment in that: the

City's occupation license tax, on its face and as applied, violates the Commerce Clause of the U.S. Constitution; the occupation license tax violates Missouri case law and the uniformity clause of the Missouri constitution; and the wrong tax rate schedule was applied to GM. This court does not reach GM's points of alleged error, however, because GM's recovery is barred by its failure to make or file a written protest at the times it paid the license taxes as required by § 139.031, RSMo 1986.[1] The trial court's grant of summary judgment is affirmed.

From 1928 to 1988, GM operated an automobile assembly facility, known as the Leeds Assembly Plant (Leeds), in Kansas City, Missouri. From 1984 through 1988, the time period pertinent to this case, Leeds assembled Oldsmobile Firenza, Buick Skyhawk and Chevrolet Cavalier automobiles. Leeds ceased operations in 1988.

While in operation, Leeds assembled automobiles by putting together component parts which were manufactured at other GM facilities or purchased from independent suppliers and shipped to Leeds. Although some of the parts used by GM were manufactured in Kansas City, the greatest percentage of the parts used by Leeds were manufactured outside of Kansas City.[2] GM operated on a

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[1] Section 139.031, RSMo 1986, was amended in 1989, but the modification occurred after the payment dates of GM's license taxes and the provisions amended do not impact the issues herein.

[2] Approximately sixty-eight percent of the cost of the components incorporated into the finished automobiles at Leeds was derived from component parts manufactured by GM at plants located outside of Missouri.

"transfer price" accounting system meaning that each component part or service was assigned a value based upon cost. The transfer price of a completed automobile consisted of the transfer price of all the component parts used in the automobile, plus the plant operating costs allocated to that vehicle. Leeds did not receive the sales proceeds from automobiles it assembled.

The City's occupation license tax was assessed under Chapter 21 of the Code of General Ordinances. The tax is to be computed on the basis of the annual gross receipts, business or commissions of all entities doing business in Kansas City. Section 21.35 states that annual gross receipts, gross annual business, and gross annual commissions shall be defined as follows:

> . . . twelve (12) times the average monthly gross receipts, gross business, or gross commissions, from whatever source derived, from:
>
> (1) All services performed.
>
> (2) All goods, wares, merchandise, chattels and all other real and tangible personal property of every kind sold, leased or manufactured by the business in question and
>
> (3) All commissions, fees, charges and compensation earned,
>
> for the time during which any business in question shall have been conducted during the license period.

Kansas City, MO, Code § 21.35 (1977).

GM was granted an occupation license by the City under the classification of automobile manufacturer. The City computed and assessed GM's occupation license tax

with respect to Leeds on the basis of the completed vehicles' transfer price reported by GM as its gross receipts for the years at issue. From 1985 through 1988, GM paid occupation license taxes to the City in the amount of approximately $3,330,000.

On December 29, 1989, GM filed suit against the City seeking recovery of the license taxes it paid from 1985 to 1988. GM's petition prayed for a judgment requiring the City to refund the license taxes GM has paid the City since January 1, 1985, with prejudgment interest thereon.

In response to GM's petition, the City filed an answer and a counterclaim seeking payment of additional taxes that the City claims are owed by GM. The City bases its claim on its audit of GM's books and records for the years 1985 through 1988. The City contends that this audit showed certain occupation license tax deficiencies resulting from GM's use of the transfer price in reporting gross receipts.

GM filed a motion for summary judgment and the City subsequently moved for summary judgment as well. After hearing oral arguments on the motions, the trial court granted the City's motion for summary judgment on all four counts of GM's petition. The court's judgment did not address the City's counterclaim, and it remains pending in the circuit court. Pursuant to Rule 74.01(b), the trial court entered a judgment determining that there was no just reason to delay appeal of the order granting summary judgment to the City. GM filed this appeal in a timely manner thereafter.

The appeal was originally entertained by this court. After the issuance of an opinion, the Supreme Court

granted transfer. The Supreme Court subsequently transferred the case back to this court for reconsideration in light of *Armco Steel v. City of Kansas City,* 883 S.W.2d 3 (Mo. banc 1994).

The trial court's order of summary judgment will be affirmed on appeal if the reviewing court determines that the movant has a right to judgment as a matter of law and that no genuine issues of material fact exist. *Manor Square v. Heartthrob,* 854 S.W.2d 38, 41 (Mo.App.1993). This court, in reviewing the trial court's order of summary judgment, will consider the record in the light most favorable to the party against whom judgment was entered and afford that party all reasonable inferences which may be drawn from the evidence. *ITT Commercial Finance v. Mid-Am. Marine,* 854 S.W.2d 371, 376 (Mo. banc 1993). The moving party bears the burden of proving that it is entitled to judgment as a matter of law and that no genuine issues of material fact exist. *Id.* at 378. An appellate court will affirm the trial court's award of summary judgment if the judgment is sustainable upon any theory within the scope of the pleadings, depositions, admissions and affidavits. *Zafft v. Eli Lilly & Co.,* 676 S.W.2d 241, 243-44 (Mo. banc 1984).

Prior to reaching GM's points raised on appeal, this court addresses the City's contention that § 139.031, RSMo 1986,[3] applies to municipal corporations and that GM is barred from recovery because it failed to comply with the provisions of that statute. Section 139.031 is a

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[3] All statutory citations are to Revised Missouri Statutes 1986, unless otherwise indicated.

state revenue law requiring a taxpayer to pay taxes under protest in order to qualify for a refund from the taxing authorities. *See Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. banc 1988). GM, on the other hand, claims that it was not required to pay taxes under protest because § 139.031 does not apply to city taxes. The Missouri Supreme Court's ruling in *Armco*, 883 S.W.2d at 8, conclusively determines that § 139.031 applies to the assessment of taxes collected by city and municipal collectors.

Armco concerned companies that purchased and transported natural gas into the City for industrial and commercial consumption. Because the companies did not believe that the City had authority to impose a license tax on them, the companies paid under protest and sought a refund. In opposition, the City claimed that the trial court erred because § 139.031 does not apply to city and municipal collectors, since the statute does not distinguish between "county collectors" and "collectors." *Id.* at 7. It was the City's contention that the two terms were interchangeable and that the word "collectors" meant only collectors of the county. *Id.* Nonetheless, the Missouri Supreme Court held that the term "collectors," as found in § 139.031, is not limited to county collectors but also includes city and municipal collectors. *Id.* at 8. Hence, "the assessment of taxes collected by city and municipal collectors are . . . subject to protest." *Id.*

In light of the *Armco* decision, § 139.031 applies to municipal taxes and acts as a potential bar to GM's

recovery.[4] Section 139.031.1 articulates that a taxpayer must pay under protest by filing "with the collector a written statement setting forth the grounds on which his protest is based" when the taxes are paid. In GM's answer to Interrogatory Number 12, GM admitted that it had never "made or filed any written protest to Defendant against payment of the License Tax pursuant to Chapter 21 of the Code of General Ordinances." This admission is dispositive of the case. Because GM did not comply with § 139.031.1, it is ineligible for a tax refund, as a matter of law.

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[4] The text of the relevant provisions of § 139.031 is as follows:

1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based.

2. The collector shall disburse to the proper official all portions of taxes not so protested and shall impound in a separate fund all portions of such taxes which are so protested. Except as provided in subsection 3 of this section, every taxpayer protesting the payment of taxes shall, within ninety days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the circuit court for the recovery of the taxes protested within the time prescribed in this subsection, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, and any interest earned thereon, as provided above in this subsection.

Nonetheless, GM argues that it was unaware that § 139.031.1 applied to city tax collections. At the time GM paid the city occupational license taxes, *Armco* had not been decided by the Missouri Supreme Court and earlier cases had not dealt with the issue. Therefore, GM claims that it had no notice that it was required to abide by the procedures set forth in § 139.031.

By asserting that the *Armco* interpretation should not apply retroactively, GM has formulated an argument which appears to be based upon the premise that the *Armco* decision had the effect of reversing or overruling previous law. Such argument is analogous to a basic precept that statutes should not be applied retroactively unless (1) the legislature specifically declares such an intent; and (2) the statute is solely remedial or procedural and does not affect the substantive rights of the parties. *See Reinerd v. A.B. Chance Co.*, 800 S.W.2d 777, 778 (Mo.App.1990). GM's situation does not concern a question of retroactivity, however.

In *Armco*, the Supreme Court addressed an issue of first impression, interpreting § 139.031 as it believed the legislature intended all along. *Armco*, 883 S.W.2d at 7-8. The court did not change an earlier interpretation on the issue of city tax collection; nor did the legislature enact a new statute which the court is attempting to apply retroactively. Parties are presumed to know the law and cannot normally avoid an act or deed on the ground that they were ignorant of the law. *See Shearin v. Fletcher/Mayo/Associates*, 687 S.W.2d 198, 202 (Mo.App.1984). GM had a duty to comply with § 139.031. It failed to satisfy this duty and cannot now claim ignorance as an excuse.

GM further argues that even if it is not entitled to a refund of the taxes under § 139.031, common law remedies are available to it for the recovery of the license tax. The Supreme Court has consistently held that "taxes, once paid, can only be recovered through proper statutory proceedings, and that the statutes must be adhered to." *Ackerman Buick, Inc. v. St. Louis County*, 771 S.W.2d 343, 346 (Mo. banc 1989) (citing *B & D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759 (Mo. banc 1983); *Westglen Village Associates v. Leachman*, 654 S.W.2d 897 (Mo. banc 1983); *Adcor Realty v. State Tax Com'n*, 627 S.W.2d 604 (Mo. banc 1982); *Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46 (Mo. banc 1981); *Metal Form Corp. v. Leachman*, 599 S.W.2d 922 (Mo. banc 1980); and *Nexus Rent-A-Car, Inc. v. Nash*, 747 S.W.2d 683 (Mo.App.1988)). In *B & D Inv. Co.*, 646 S.W.2d at 762, the Supreme Court acknowledged the purpose of statutes such as § 139.031, as follows:

> The essential purposes of such statutes are to furnish an adequate and sufficient remedy to the taxpayer, and at the same time to provide an expeditious method by which the various branches of government affected can obtain the revenue necessary for their maintenance without protracted delay or the hazards incident to the former procedure, since it is in effect a procedure to review the decisions of the taxing authorities. Moreover, the statutory requirement is intended not only to furnish proof that the payment was involuntarily made, but also to warn the tax collector that the tax is claimed to be illegal; and the filing of a protest has two purposes, to serve notice on the government of the dissatisfaction of the taxpayer, and to define

the grounds on which the taxpayer stands. 84 C.J.S. *Taxation* § 638 (1974).

An exception to the rule that statutory remedies are exclusive has only been found in cases involving a taxpayer's contest of the legality of an increased assessed valuation placed upon the taxpayer's property where the taxpayer has been totally deprived of administrative remedies by the assessor's failure to give the required statutory notice. *See Crest Communications v. Kuehle*, 754 S.W.2d at 565-66; *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59, 63 (Mo.1974); and *Ingels v. Noel*, 804 S.W.2d 808, 810 (Mo.App.1991). These cases do not aid GM.

GM has not complied with the requirements of § 139.031 or any other statute which provides an available route for the recovery of taxes. Therefore, GM is ineligible for a tax refund. Accordingly, we will not address GM's points of alleged error.

The grant of summary judgment in favor of the City is affirmed.

All concur.

APPENDIX B

No. 76839
W.D. Nos. 46246 & 46526
(Consolidated)

IN THE SUPREME COURT OF MISSOURI

MAY *Session, 1994*

General Motors Corporation **Appellant,**

vs.

City of Kansas City, Missouri, **Respondent.**

Now at this day, on consideration of respondent's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that said application be, and the same is hereby sustained.

It is further ordered that the cause be, and it is hereby retransferred to the said Missouri Court of Appeals for reconsideration in light of Armco Steel, et al. vs. City of Kansas City, Missouri, et al., No. 76094 (Banc August 15, 1994).

STATE OF MISSOURI - Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May *Session thereof, 1994, and on the* 15th *day of* August *1994, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 15th *day of* August *1994.*

/s/ Thomas Simon *Clerk*

/s/ Christina S. Vinson *D.C.*

APPENDIX C

Not Reported in S.W.2d
(Cite as: 1994 WL 49620 (Mo.App. W.D.))

NOTICE: THIS CASE HAS BEEN ORDERED TRANSFERRED TO THE SUPREME COURT OF MISSOURI. OPINIONS OF THE COURT OF APPEALS IN CASES TRANSFERRED TO THE SUPREME COURT ARE NOT PUBLISHED IN THE PERMANENT LAW REPORTS.

GENERAL MOTORS CORPORATION
Appellant,
v.
CITY OF KANSAS CITY, Missouri,
Respondent.

Nos. WD 46246, WD 46526.

Missouri Court of Appeals,
Western District.

Feb. 22, 1994.

Motion for Rehearing and/or Transfer to Supreme Court Denied March 29, 1994.

Sustained and Cause Ordered Transferred Aug. 15, 1994.

Retransferred to Court of Appeals Aug. 15, 1994.
For Opinion after Retransfer, see 1995 wl 6026.

Paul S. Kelly, Gage and Tucker, Kansas City, for appellant.

George L. Debitetto, Asst. City Atty., Kansas City, for respondent.

Before ULRICH, P.J., and BRECKENRIDGE and HANNA, JJ.

BRECKENRIDGE, Judge.

General Motors Corporation (GM) appeals from the trial court's order granting summary judgment in favor of the City of Kansas City (City) on GM's claims seeking recovery of occupation license taxes which GM alleges were illegally assessed by Kansas City against GM. GM raises five points on appeal arguing that the trial court erred in granting the City summary judgment in that: 1) the City's occupation license tax is unconstitutional on its face because it has the potential to impose a greater tax burden on taxpayers operating in multiple jurisdictions than on those operating only in the City; 2) the City's occupation license tax is unconstitutional as applied to GM in that it taxes more than just the value of manufacturing conducted within the City; 3) the City's occupation license tax violates Missouri case law requiring a tax on gross receipts to be limited to value added within the taxing jurisdiction; 4) the City's failure to apportion GM's gross receipts to limit the license tax to the value added in the City, as is done for other manufacturers, violates the uniformity clause of the Missouri Constitution; and 5) the City has applied the wrong tax rate schedule to GM. This court finds that the City's occupation license tax is unconstitutional as applied to GM in that it is not limited in its application to manufacturing that occurs within the City, but that GM has failed to plead a cause of action for a refund of the unconstitutional tax. GM has shown, however, a state of facts upon which it might be able to recover if its case were properly pled. The summary judgment is reversed and, in the exercise of sound judicial discretion, the cause is remanded to give GM an

opportunity to amend its petition to state a cause of action for refund of the unconstitutional tax.

From 1928 to 1988, GM operated an automobile assembly facility, known as the Leeds Assembly Plant (Leeds), in Kansas City, Missouri. From 1984 through 1988, the time period pertinent to this case, Leeds assembled Oldsmobile Firenza, Buick Skyhawk and Chevrolet Cavalier automobiles. Leeds ceased operations in 1988.

While in operation, Leeds assembled automobiles by putting together component parts which were manufactured at other GM facilities or purchased from independent suppliers and shipped to Leeds. Although some of the parts used by GM were manufactured in Kansas City, the greatest percentage of the parts used by Leeds were manufactured outside of Kansas City.[1] GM operated on a "transfer price" accounting system meaning that each component part or service was assigned a value based upon cost. The transfer price of a completed automobile consisted of the transfer price of all the component parts used in the automobile, plus the plant operating costs allocated to that vehicle. Leeds did not receive the sales proceeds from automobiles it assembled.

The City's occupation license tax was assessed under Chapter 21 of the Code of General Ordinances. The tax is to be computed on the basis of the annual gross receipts, business or commissions of all entities doing business in

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[1] Approximately sixty-eight percent of the cost of the components incorporated into the finished automobiles at Leeds was derived from component parts manufactured by GM at plants located outside of Missouri.

Kansas City. Section 21.35 states that annual gross receipts, gross annual business, and gross annual commissions shall be defined as follows:

> . . . twelve (12) times the average monthly gross receipts, gross business, or gross commissions, from whatever source derived, from:
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> (1) All services performed.
>
> (2) All goods, wares, merchandise, chattels and all other real and tangible personal property of every kind sold, leased or manufactured by the business in question and
>
> (3) All commissions, fees, charges and compensation earned,
>
> (4) for the time during which any business in question shall have been conducted during the license period.

Kansas City, MO, Code § 21.35 (1977).

GM was granted an occupation license by the City under the classification of automobile manufacturer. The City computed and assessed GM's occupation license tax with respect to Leeds on the basis of the completed vehicles' transfer price reported by GM as its gross receipts for the years at issue. From 1985 through 1988, GM paid occupation license taxes to the City in the amount of approximately $3,330,000.

On December 29, 1989, GM filed suit against the City seeking recovery of the license taxes it paid from 1985 to 1988. GM's petition alleged the following four counts: 1) the license tax, on its face, violates the Commerce Clause of the United States Constitution; 2) the license tax, as applied to GM, violates the Commerce Clause; 3) the City

has violated Missouri law by assessing and collecting the license tax from GM on the basis of the wholesale price; and 4) the City erroneously assessed the license tax at the rate applicable to manufacturers when it should have been assessed at the lower rate applicable to a "motor vehicle business." GM's petition prayed for a judgment requiring the City to refund the license taxes GM has paid the City since January 1, 1985, with prejudgment interest thereon.

In response to GM's petition, the City filed an answer and a counterclaim seeking payment of additional taxes that the City claims are owed by GM. The City bases its claim on its audit of GM's books and records for the years 1985 through 1988. The City contends that this audit showed certain occupation license tax deficiencies resulting from GM's use of the transfer price in reporting gross receipts.

GM filed a motion for summary judgment and the City subsequently moved for summary judgment as well. After hearing oral arguments on the motions, the trial court granted the City's motion for summary judgment on all four counts of GM's petition. The court's judgment did not address the City's counterclaim, and it remains pending in the circuit court. Pursuant to Rule 74.01(b), the trial court entered a judgment determining that there was no just reason to delay appeal of the order granting summary judgment to the City. GM filed this appeal in a timely manner thereafter.

The trial court's order of summary judgment will be affirmed on appeal if the reviewing court determines that the movant had a right to judgment as a matter of law

and that no genuine issues of material fact existed. Manor Square v. Heartthrob, 854 S.W.2d 38, 41 (Mo.App.1993). This court, in reviewing the trial court's order of summary judgment, must consider the record in the light most favorable to the party against whom judgment was entered and afford that party all reasonable inferences which may be drawn from the evidence. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). The moving party bears the burden of proving that it is entitled to judgment as a matter of law and that no genuine issues of material fact exist. Id. at 378. An appellate court is required to affirm the trial court's award of summary judgment if the judgment is sustainable upon any theory within the scope of the pleadings, depositions, admissions and affidavits. Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 243-44 (Mo. banc 1984).

Prior to addressing the points raised by GM on appeal, this court must determine whether it has jurisdiction to decide this case. The City claims in its brief that this court lacks jurisdiction and, in support of this claim, restates the arguments asserted in its motion to dismiss or transfer to the Missouri Supreme Court which was denied by this court.[2] The City claimed in its motion and

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[2] The City did not plead GM's failure to exhaust administrative remedies in its answer. Its subsequent motion to amend its answer to include such a defense was denied by the trial court. Despite the City's failure to plead the issue, it will be addressed sua sponte by this court since the failure to exhaust administrative remedies is jurisdictional. Citizens for Waste Mgt. v. St. Louis County, 810 S.W.2d 635, 638 (Mo.App.1991); American Hog Company v. County of Clinton, 495 S.W.2d 123, 126 (Mo.App.1973).

again argues on appeal that the Missouri Supreme Court, rather than this court, has jurisdiction to decide this case because it involves construction of § 139.031, RSMo Cum.Supp.1992.[3] The City contends that § 139.031 applies to municipal corporations and that GM is barred from recovery because it failed to comply with the provisions of that statute.

Section 139.031 is a state revenue law requiring a taxpayer to pay taxes under protest in order to qualify for a refund from the taxing authorities, Crest Communications v. Kuehle, 754 S.W.2d 563 (Mo. banc 1988). Article 5, Section 3 of the Missouri Constitution grants exclusive appellate jurisdiction to the Supreme Court in all cases involving the construction of a state revenue law. Asarco, Inc. v. McHenry, 679 S.W.2d 863, 864 (Mo. banc 1984). When the Supreme Court has previously ruled on an issue, even if implicitly rather than directly, the intermediate appellate courts have jurisdiction to apply the law. Walter-Kroenke Properties v. Tax Com'n, 742 S.W.2d 242, 243 (Mo.App.1987).

Although the Missouri Supreme Court has not addressed the application of § 139.031, as a whole, to city collectors,[4] the Missouri Supreme Court addressed the

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[3] All statutory citations are to Revised Missouri Statutes Cum.Supp.1992, unless otherwise indicated.

[4] The facts of Parkway Motors, Inc. v. Thompson, 825 S.W.2d 302 (Mo. banc 1992), involve the use of § 139.031 to protest payment of taxes assessed by a municipality, however, whether § 139.031 was properly used for such a protest was not an issue in the case. In Parkway Motors, five automobile dealers sued the City of Cape Girardeau to recover license taxes the

applicability of a specific subsection, § 139.031.5, to city collectors in Crest Communications, 754 S.W.2d at 567. The Crest Communications court acknowledged that, by its terms, § 139.031.5 applies only to county collectors. Id.

The cases other than Crest Communications which interpret § 139.031 consistently involve protests filed by taxpayers paying taxes collected by county collectors. Although some of the language of § 139.031 appears to encompass "all taxpayers" regardless of the type of taxes they are paying, the administrative procedure for protesting the payment of taxes requires the filing of a timely and proper appeal of the protested tax with the state tax commission. Section 139.031.3. The authority of the state tax commission does not extend to city taxes. See Section 138.380.

Finally, the overall legislative scheme of Missouri tax laws demonstrates that Chapter 139 is inapplicable to cities. The statutes included in Chapters 89 through 99, RSMo, are uniquely applicable to cities. Chapters 92, 93 and 94 specifically relate to taxation by cities. Sections 92.040, 92.045 and 94.110 contain the authorization for cities to collect license taxes on businesses. In contrast, the statutes contained in Chapters 136 to 141 apply to the

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dealers paid to the City. During its recitation of the facts, the court states that the dealers "paid the taxes then due under protest pursuant to § 139.031." Although the Parkway Motors court makes this statement, it is merely a recitation of the events that took place prior to the appeal. Whether § 139.031 was properly used to protest the payment of city license taxes was not an issue in the case and the court does not discuss or decide whether § 139.031 may correctly be utilized for protesting the payment of city license taxes.

collection of state and county taxes. Even though some provisions of Chapter 140 are applicable to cities, these provisions are limited to the collection of delinquent real estate taxes and do not apply to other types of taxes.

Transfer to the Supreme Court is not required on the basis that the instant case requires construction of a revenue law. Jurisdiction remains in the Court of Appeals when a claim is merely colorable rather than substantial. Matter of Estate of Potashnick, 841 S.W.2d 714, 719 (Mo.App.1992). Considering the Supreme Court ruling in Crest Communications, the plain and ordinary meaning of the language of § 139.031 and the overall statutory scheme of Missouri tax laws, this court finds that GM's claim in the instant case is merely colorable rather than substantial and jurisdiction is proper in the Court of Appeals rather than the Missouri Supreme Court. Id. Since § 139.031 is inapplicable, the statute obviously does not act as a bar to GM's recovery.

This appeal also involves a claim as to the constitutionality of the Kansas City license tax ordinance from which GM seeks a refund. The Supreme Court has exclusive appellate jurisdiction of "all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death." Mo. Const. of 1945, Art. 5, § 3 (1982). A claim as to the constitutionality of a city ordinance does not require transfer of this case to the Missouri Supreme Court because it is not within the direct or exclusive appellate jurisdiction of the Missouri Supreme

Court. Miller v. City of Springfield, 750 S.W.2d 118, 119 (Mo.App.1988).

Upon finding that § 139.031 applies to county collectors but not city collectors and that there is no constitutional claim within the exclusive jurisdiction of the Supreme Court, this court determines that it has jurisdiction to decide the issues raised in this appeal.

In Point I, GM argues that the trial court erred in granting the City's motion for summary judgment because the City's occupation license tax, on its face, violates the Commerce Clause of the U.S. Constitution in that it lacks "internal consistency," a requirement imposed by recent United States Supreme Court decisions. GM argues that the City's license tax lacks internal consistency because it has the potential to impose a greater tax burden on taxpayers operating in multiple jurisdictions than on those operating in a single jurisdiction.

The Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, protects free trade among the states by restricting both state and municipal governments from discriminating against interstate commerce. Armco Inc. v. Hardesty, 467 U.S. 638, 642, 104 S.Ct. 2620, 2622, 81 L.Ed.2d 540 (1984). The Commerce Clause prohibits a state from discriminating against interstate commerce by taxing an interstate transaction more heavily than a transaction occurring entirely within the state. Id. The once prevailing rule, however, that the states could not directly tax interstate commerce is no longer valid and interstate commerce is generally required to pay its fair share of state taxes. D.H.

Holmes Co. Ltd. v. McNamara, 486 U.S. 24, 30, 108 S.Ct. 1619, 1623, 100 L.Ed.2d 21 (1988).

To be constitutional, a state or local tax must comply with the four-part test set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). A tax will be upheld against a Commerce Clause challenge if the tax: 1) is applied to an activity with a substantial nexus to the taxing jurisdiction; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the taxing jurisdiction. Id. The U.S. Supreme Court reaffirmed the validity of this test in Goldberg v. Sweet, 488 U.S. 252, 260, 109 S.Ct. 582, 588, 102 L.Ed.2d 607 (1989).

This court must evaluate the City license tax ordinance in the context of the Complete Auto test to determine whether the ordinance is constitutional on its face. Although the test has four prongs, GM argues in Point I only that the tax ordinance, on its face, fails the internal consistency test which is a portion of the evaluation under the second prong.

The second prong of the Complete Auto test requires a determination of whether the license tax is fairly apportioned. A tax that unfairly apportions activity from other states discriminates against interstate commerce. Armco, 467 U.S. at 645, 104 S.Ct. at 2624. The central purpose behind the requirement of fair apportionment is to insure that a taxing authority taxes only its fair share of an interstate transaction. Goldberg, 488 U.S. at 259, 109 S.Ct. at 588. The Constitution does not impose, nor has the United States Supreme Court mandated, any single

method or particular formula of apportionment for the states to follow. Id. Instead, an evaluation of whether a tax is fairly apportioned is made by examining whether the tax is internally and externally consistent. Id., 488 U.S. at 261, 109 S.Ct. at 589.

The test of internal consistency requires a tax to be structured so that, even if every state imposed an identical tax, there would not be any impermissible interference with free trade. Armco, 467 U.S. at 643, 104 S.Ct. at 2623. To be internally consistent, a tax must also be structured so that multiple taxation would not result if every state imposed an identical tax. Goldberg, 488 U.S. at 261, 109 S.Ct. at 589. In applying the internal consistency test, a court is to focus on the text of the challenged ordinance and hypothesize a situation in which another state has imposed the identical ordinance. Id. The internal consistency test assures that a taxpayer does not have to prove actual discrimination nor establish that a state already imposes a tax which results in a greater burden to interstate commerce than to intrastate commerce. Armco, 467 U.S. at 643, 104 S.Ct. at 2623.

GM argues that two decisions of the United States Supreme Court, Armco, 467 U.S. 638, 104 S.Ct. 2620, and Tyler Pipe Industries, Inc. v. Wash. State Dept. of Rev., 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), render the Kansas City license fee ordinance unconstitutional because the ordinance violates the internal consistency test. Both Armco and Tyler involve state statutes which levy a gross receipts tax on both wholesaling and manufacturing. In Armco, West Virginia imposed a gross receipts tax on entities engaged in the business of selling

tangible property at wholesale. Local manufacturers making sales in West Virginia were exempt from the tax, but were subject to a higher manufacturing tax. The Court held that the tax unconstitutionally discriminated against interstate commerce by treating intrastate commerce more favorably than interstate commerce. Armco, 467 U.S. at 641, 104 S.Ct. at 2622. The impact of the tax was that if the goods were manufactured in West Virginia then the company was not subject to tax on the sale, however, if the goods were manufactured outside of West Virginia and sold in West Virginia, the company was subject to a tax. The tax, thus, discriminated against interstate commerce by treating the local manufacturer more favorably than the out-of-state manufacturer. Id., 467 U.S. at 643, 104 S.Ct. at 2623.

The dispute in Tyler Pipe was in regard to Washington's business and occupation tax which was imposed on the privilege of engaging in business activities, including manufacturing and wholesale sales, in the state. A multiple activities exemption in the statute excluded local manufacturers from the application of the wholesale tax. The Court held that the tax discriminated against interstate commerce because it treated local manufacturers in a more favorable manner than interstate manufacturers. Tyler, 483 U.S. at 247, 107 S.Ct. 2820.

GM claims that the license tax imposed by the City is not internally consistent because it contains alternative rate schedules which are practically equivalent to the exemptions invalidated by the Court in Armco and Tyler. Any tax, even if it has a different statutory structure, which is the practical equivalent of those considered in Armco and Tyler is unconstitutional. Id., 483 U.S. at 241,

107 S.Ct. at 2817. GM contends that the City's alternative rate schedules, requiring that only one rate schedule can ever apply to the same gross receipts of the taxpayer, are the practical equivalent of the taxes in Armco and Tyler. GM argues that in the instant case, just as in Armco and Tyler, a manufacturer both selling and manufacturing within Kansas City is required to pay only one tax on either selling or manufacturing, where a manufacturer manufacturing in one jurisdiction but selling in another is required to pay both taxes. GM argues that the statute, therefore, unfairly encourages intrastate commerce by discriminating against interstate commerce.

In evaluating the merits of GM's argument, this court considers, hypothetically, what would result if another city enacted a provision identical to the Kansas City ordinance. Unlike the statute in Armco and Tyler, the City's license tax ordinance does not discriminate against interstate commerce through the use of an express statutory exemption favoring local manufacturers or contain a tax structure which is the practical equivalent of the exemptions invalidated by the Court in Armco and Tyler. Neither does the City's ordinance impose an impermissible burden on interstate commerce. Manufacturers are treated consistently whether local or out of state. A product manufactured in Kansas City would be taxed in Kansas City and a product manufactured in the hypothetical jurisdiction would be taxed in that jurisdiction, regardless of where the sale of the product occurs.

GM's argument that the ordinance discriminates against non-local manufacturers who manufacture their own parts is without merit. Parts manufactured by independent suppliers and sold to GM for use in assembly

will be taxed in the jurisdiction where manufactured. Parts manufactured by GM for use in assembly will also be taxed in the jurisdiction where manufactured. A component part manufactured in Kansas City would be taxed in Kansas City and a part manufactured in the hypothetical jurisdiction would be taxed by that jurisdiction, without regard to whether the part was manufactured by an independent supplier or by GM. No provision of the ordinance taxes activities that take place in other jurisdictions. A manufacturer would only pay taxes on its activities within the taxing jurisdiction.

The Commerce Clause is only violated if the ordinance discriminates against interstate commerce and such is not the situation in the instant case. GM's argument that the licensing tax ordinance is unconstitutional on its face because it is not internally consistent is without merit. Point I is denied.

GM argues in Point II, that the circuit court erred in granting the City's motion for summary judgment because the City's license tax is unconstitutional as applied to GM. In this point, GM again raises the argument that the tax is not fairly apportioned under the second prong of the Complete Auto test. GM claims that the Commerce Clause requires the City to apportion GM's gross receipts so that the reach of the license tax is limited to the value of the manufacturing GM conducted within the City. GM argues that the tax, as applied to it, is not fairly apportioned because it violates both the internal and external consistency tests. Because this court finds that the application of the license tax ordinance is not externally consistent, it is unnecessary to address the issue of whether the tax is internally consistent.

State and local taxation, regardless of its form, must not discriminate against interstate commerce or attempt to tax activities in commerce that extend beyond the territorial limits of the taxing jurisdiction. Gwin, White & Prince v. Henneford, 305 U.S. 434, 438-39, 59 S.Ct. 325, 327, 83 L.Ed. 272 (1939). A state may collect a tax which does not contain a specific provision for apportionment as long as the tax is imposed only on those receipts from interstate transactions which can be attributed to activities taking place entirely within the jurisdiction of the taxing state. Laurence H. Tribe, American Constitutional Law § 6-19, at 464 (2d ed. 1988).

The external consistency test examines whether the tax is levied solely upon the revenue from interstate commerce which reasonably represents the in-state portion of the activity being taxed. Goldberg, 488 U.S. at 261, 109 S.Ct. at 589. The external consistency concept is a combination of examining the in-state business activity which constitutes the taxable event and the practical or economic effect of the tax on that interstate activity. Id.

Although the Court coined the term "external consistency" for the first time in Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed. 2d 545 (1983), the underlying principle, that the tax should only be levied on that interstate activity which reasonably represents activity within the taxing jurisdiction has consistently been recognized in the Court's prior case law. The Court has utilized this principle to uphold as constitutional taxes imposed solely upon activities which take place within the taxing jurisdiction. See General Motors Corporation v. Washington, 377 U.S. 436, 449, 84 S.Ct. 1564, 1572, 12 L.Ed.2d 430 (1964); American Mfg.

Co. v. City of St. Louis, 250 U.S. 459, 464-65, 39 S.Ct. 522, 524, 63 L.Ed. 1084 (1919). In American Mfg. Co., 250 U.S. at 461, 39 S.Ct. at 523, the Court found constitutional a tax imposed by St. Louis upon the manufacture of goods in St. Louis which was computed according to the amount of the sales of goods. The Court stated "[t]here is no doubt of the power of the state, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city." Id.

If external consistency is lacking, however, the Court will find unconstitutional taxes which are not fairly apportioned to the activities which take place within the taxing jurisdiction. Goldberg, 488 U.S. at 261, 109 S.Ct. at 589. The Court invalidated a tax in Gwin, White & Prince, 305 U.S. at 439, 59 S.Ct. at 328, which was not apportioned to the activities within the state but was based upon the entire volume of interstate commerce in which the taxpayer participated. The tax was levied upon gross receipts from interstate activities both inside and outside the taxing state. Id.

The City may only constitutionally tax that portion of GM's manufacturing process occurring within the City. Considering the nature of the activity at the Leeds plant, the issue before the court in the case at bar is whether the assembly of component parts into completed automobiles is a manufacturing process conducted entirely within the City or whether it is part of a multistate process requiring apportionment to other taxing jurisdictions of that portion of the manufacturing activities attributable to such jurisdictions.

The parties do not cite and this court did not find any jurisdiction which has applied the Complete Auto test in analyzing whether the Commerce Clause of the U.S. Constitution requires apportionment of an occupation license tax imposed upon a business manufacturing a product under circumstances like GM's. The City refers this court to the ruling of the California Supreme Court in General Motors Corp. v. City of Los Angeles, 5 Cal.3d 229, 95 Cal.Rptr. 635, 486 P.2d 163 (1971). The California Supreme Court applied California constitutional provisions forbidding extraterritorial application of the laws and guaranteeing equal protection, combined with the equal protection clause of the federal constitution, in considering whether there was discrimination against intercity commerce. Id. at 170. The California Supreme Court found that the automobiles assembled by GM in Los Angeles from component parts were "wholly manufactured" within Los Angeles and upheld the imposition of a business privilege tax upon the total value of gross receipts from the sales of automobiles GM assembled within the city. Id.

Although the factual situation is analogous to the instant case, the legal ruling of City of Los Angeles is distinguishable in that the particular provision of the Los Angeles city ordinance is limited in its application to manufactured products sold within the state of California[5] Since interstate commerce was not involved, the

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[5] The applicable provision of the Los Angeles city ordinance is set forth and examined in Carnation Company v. City of Los Angeles, 65 Cal.2d 36, 52 Cal.Rptr. 225, 416 P.2d 129, 129-30 (1966).

court was not required to examine the validity of the tax under the Commerce Clause of the U.S. Constitution. Due to this distinction, this court finds the holding of the California Supreme Court inapplicable in the instant case.

This court, unlike the California Supreme Court in City of Los Angeles, must examine the City's tax in light of the Commerce Clause of the United States Constitution because the activity being taxed by the City includes manufacturing activity of an interstate nature. Under § 21.36 of the City Code, the license tax is computed on the basis of "annual gross receipts." The City interprets "gross receipts" to mean the total value of the finished automobiles assembled at Leeds, even though a portion of the component parts incorporated into the finished automobiles were manufactured in other jurisdictions. The City's definition of "gross receipts" does not properly apportion gross receipts to recognize the value of those component parts.

The City's occupation license tax is not limited to GM's manufacturing activity occurring within the City, but also taxes that portion of GM's gross receipts derived from its interstate activities. The portion of the value of the assembled automobile derived from the manufacture of component parts should be excluded from the gross receipts taxed by Kansas City and taxed instead by the jurisdiction where such parts were manufactured.

This court must next examine whether the City's application of the tax upon GM's entire gross receipts discriminates against interstate commerce. This court finds that the licensing tax as applied by the City exposes GM to greater tax liability considering that GM conducts

its manufacturing in multiple jurisdictions rather than entirely within the City. Under such application, GM could be subject to tax on the manufacture of the component parts in other jurisdictions and on the entire gross receipts from the completed automobile in the City. As applied, the City's license tax discriminates against interstate commerce. The City's tax, as applied, fails the Complete Auto test and is, therefore, unconstitutional.

Although the tax is found to be unconstitutional, GM must prove its entitlement to a refund. Public policy discourages the refund of taxes illegally collected or erroneously paid and many restrictions are imposed on their recovery. Com. Fed. Sav. & Loan v. Director of Rev., 752 S.W.2d 794, 797 (Mo. banc 1988). Governments budget on an annual cash basis and, without a statutory time limit for suing to challenge the constitutionality of a tax, the refund of unconstitutional taxes would expose governments to substantial liabilities. Id. "Accordingly, in the absence of statutory authority, taxes voluntarily, although erroneously paid, albeit under an unconstitutional statute, cannot be refunded." Id.

GM does not claim a right to a refund pursuant to any statute. In the absence of a statute which supersedes the common law, the common law provides the right to a refund when the invalid or illegal taxes are paid involuntarily or under coercion or duress. Manufacturer's Casualty Ins. Co. v. Kansas City, 330 S.W.2d 263, 266-67 (Mo.App.1959). GM does not plead a cause of action for the recovery of taxes paid in that it does not plead that the tax was paid involuntarily nor plead any facts to show that the payment was made under duress or compulsion. Rule 55.05; Berkowski v. St. Louis County, 854

S.W.2d 819, 823 (Mo.App.1993). See also Loving v. City of St. Joseph, 753 S.W.2d 49, 52 (Mo.App.1988) (petition did not plead a cause of action for recovery of fee paid for use of tennis courts because there was no allegation or facts pleaded to show that the payment was involuntary). It appears from the record, however, that there are facts which might entitle GM to recover if its case were properly pleaded. See Com. Fed. Sav. & Loan v. Director of Rev., 752 S.W.2d 794, 797 (Mo. banc), cert. denied, 488 U.S. 893, 109 S.Ct. 231, 102 L.Ed.2d 221 (1988). In the exercise of sound judicial discretion, the court will remand the cause to give GM an opportunity to amend its petition to plead a cause of action for refund. See Stouse v. Stouse, 270 S.W.2d 822, 826 (Mo.1954); Scher v. Gilpin, 738 S.W.2d 900, 901-02 (Mo.App. 1987); Fairbanks v. Chambers, 665 S.W.2d 33, 40 (Mo.App.1984).

As a consequence of the reversal upon Point II, the allegations of error in GM's Points III and IV need not be reached. The court will address GM's Point V, however, because the issues raised might be integral to the disposition on remand.

GM claims in Point V that the circuit court erred in granting summary judgment because the City applied the wrong tax rate schedule of its licensing ordinance to GM. GM claims that it should be classified as a motor vehicle business under § 21.211 of the City Code rather than a manufacturer under § 21.36. GM's argument is based on its position that the motor vehicle business classification is a more specific classification than that of manufacturer and § 21.36 requires the more specific schedule to be applied if more than one schedule is applicable. Classification under the motor vehicle business category would

result in a license tax for GM of $10,000 per year since 1985, rather than the $3,329,810.61 GM actually paid from 1985 to 1988.

GM's claim is without merit. "The intent of a municipal legislative body 'is to be found primarily in the language of the ordinance.' " City of Joplin v. Joplin Water Works Company, 386 S.W.2d 369, 373 (Mo.1965) (citation omitted). In construing an ordinance, the words should be given their ordinary meaning. City of St. Louis v. Roe, 823 S.W.2d 29, 31 (Mo.App.1991). The ordinary meaning of the language of § 21.36 reveals that the general rate schedule of rates for business, trade, profession or occupation applies "unless otherwise provided in this article." Such language is not repeated in the introduction to the schedule of rates for manufacturers. Of the specific business classifications in §§ 21.41-.306, none of the classifications pertain to manufacturing activities. The trial court's ruling that the proper classification for GM is manufacturing rather than a motor vehicle business under § 21.211 is supported by substantial evidence and is a proper application of the law. Point V is denied.

Upon finding that the provisions of the City's occupation license tax applicable to manufacturers is unconstitutional as applied to GM because the tax is not limited in its application to manufacturing that occurs within the City, the grant of summary judgment is reversed. The cause of action is remanded for further proceedings consistent with this opinion.

All concur.

APPENDIX D

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT KANSAS CITY

GENERAL MOTORS CORPORATION,	)	
Plaintiff,	)	Case No. CV89-33169
v.	)	Division No. 7
CITY OF KANSAS CITY, MISSOURI,	)	
Defendant.	)	

JUDGMENT

This matter came on for hearing on March 20, 1992. At that time, the Court heard argument from plaintiff General Motors Corporation ("GM") and defendant City of Kansas City, Missouri (the "City") on both GM's and the City's cross-motions for summary judgment on GM's four-count petition. On March 24, 1992, an order was entered granting summary judgment in favor of the City on all four counts of GM's petition. Although a counter-claim by the City is still pending, the factual and legal issues presented therein are not common with those involved in GM's petition. Therefore, it is the express determination of this Court that there is no just reason to delay the entry of a judgment on GM's petition consistent with the Order of March 24, 1992.

Accordingly, the Court hereby enters judgment in favor of defendant City of Kansas City, Missouri and

against plaintiff General Motors Corporation on all four counts of plaintiff's petition.

/s/ William F. Mauer
William F. Mauer, Judge

Dated: 6/5/92

APPENDIX E

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

GENERAL MOTORS CORPORATION,	)	
Plaintiff,	)	Case No. CV89-33169
vs.	)	
CITY OF KANSAS CITY, MISSOURI,	)	Division 7 Civil Docket "E"
Defendant.	)	

ORDER

Plaintiff's and defendant's **MOTION FOR SUMMARY JUDGMENT** coming on for hearing, the Court reviewing suggestions in support and defendant's suggestions in opposition, the Court hereby sustains defendant City of Kansas City, Missouri's motion for summary judgment.

As to Count I, there are no express or implied exemptions in the license tax. The classification of manufacturer and merchant are separate activites and classifications. To do as plaintiff proposes, defendant would have to impose a tax on the manufacture of a product and on the sale of a produce. The product then would be subject to double taxation. The defendant has chosen to include a manufacturer's sale of his product to be the one activity it taxes as to manufacturing. If, as plaintiff states, the automobiles are subject to a tax in Detroit, plaintiff may consider sueing the City of Detroit. Neither manufacturers nor

merchants are exempt from taxes if their products are sold or manufactured locally. Therefore, there is no discrimination and the license tax does not violate the Interstate Commerce Clause.

As to Count II, plaintiff is a manufacturer who manufactures its cars entirely within the City of Kansas City, Missouri. While plaintiff gets its parts from elsewhere, these parts lose their identity when assembled into the finished product. Nothing is added to a transmission brought in from outside Kansas City. It is added to the car in the manufacture of the car. Therefore, it becomes part of the car. The value of the total finished product is taxed. The plaintiff, therefore, is not entitled to apportionment. As to Counts III and IV, the defendant applies it's [sic] taxes uniformly, therefore, there is no violation of the Missouri Constitution.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant have summary judgment against the plaintiff on Counts I, II, III and IV of plaintiff's petition. Costs are assessed against the plaintiff.

/s/ William F. Mauer
JUDGE

DATED: 3/24/92

COPIES TO:
Paul Scott Kelly, Jr.
George L. DeBitetto

APPENDIX F

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

GENERAL MOTORS CORPORATION,	)	
Plaintiff,	)	Case No. CV89-33169
vs.	)	Division 7
CITY OF KANSAS CITY, MISSOURI,	)	Civil Docket "E"
Defendant.	)	

ORDER

Defendant's **MOTION TO DISMISS** coming on for hearing, the Court reviewing suggestions in support and plaintiff's suggestions in opposition, the Court hereby overrules defendant's motion to dismiss. Section 139.031 does not apply to Cities and the failure to file the written protest under A5.25 doesn't preclude an action for refund since the action is based on constitutional issues. In addition, since there are no administrative remedies in the Code, none could be exhausted.

/s/ William F. Mauer
JUDGE

DATED: 10/11/91

COPIES TO:
George L. DeBitetto
Paul Scott Kelly, Jr.

APPENDIX G

IN THE SUPREME COURT OF MISSOURI

No. 77799
W.D. No. 46246

January Session, 1995

General Motors Corporation, Appellant,

vs. (TRANSFER)

City of Kansas City, Missouri, Respondent.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1995, and on the 25th day of April, 1995, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 25th day of April, 1995.

/s/ Thomas Simon Clerk

_____ D.C.

APPENDIX H

MISSOURI COURT OF APPEALS
WESTERN DISTRICT
1300 OAK STREET
KANSAS CITY, MO 64106-2970
PEGGY STEVENS MCGRAW
CLERK-DOCKET ATTORNEY
AREA CODE 816-889-3600
FAX 816-889-3668

February 28, 1995

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: GENERAL MOTORS CORPORATION,
APPELLANT

vs.

CITY OF KANSAS CITY, MISSOURI,
RESPONDENT

WD# 46246

Please be advised that Appellant's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

cc: Paul S Kelly
George L Debitetto

APPENDIX I

MISSOURI COURT OF APPEALS WESTERN DISTRICT | CASE RECORD AS OF 10-31-94 | **46246** PAGE 1

GENERAL MOTORS CORPORATION, APPELLANT
15188 PAUL S KELLY JR. PRIVATE ATTORNEY
GAGE AND TUCKER, P O BOX 23428,
KANSAS CITY, MO 64141

VS.

CITY OF KANSAS CITY, MISSOURI, RESPONDENT
17673 GEORGE L DEBITETTO, PRIVATE ATTORNEY
2800 CITY HALL, 414 EAST 12TH STREET,
KANSAS CITY, MO 64106

******* TRAILER CASE NUMBER 46526 *******

GENERAL MOTORS CORPORATION, APPELLANT
15188 PAUL S KELLY JR. PRIVATE ATTORNEY
GAGE AND TUCKER, P O BOX 23428,
KANSAS CITY, MO 64141

VS.

CITY OF KANSAS CITY, MISSOURI, RESPONDENT
17673 GEORGE L DEBITETTO, PRIVATE ATTORNEY
2800 CITY HALL, 414 EAST 12TH STREET,
KANSAS CITY, MO 64106

* * *

09-08-94 15188 MOTION TO RE-ARGUE THE CASE*
PAUL S KELLY JR
(SUGGESTIONS IN SUPPORT FILED BY 15188 ON 09-08-94)
(SUGGESTIONS IN OPPOSITION FILED BY 17673 ON 09-15-94)
DENIED 10-28-94

09-08-94	15188	MOTION TO FILE ADDITIONAL BRIEFS* PAUL S KELLY JR (SUGGESTIONS IN SUPPORT FILED BY 15188 ON 09-08-94) (SUGGESTIONS IN OPPOSITION FILED BY 17673 ON 09-15-94) **DENIED 10-28-94**
09-08-94	15188	MOTION TO FILE SUPPLEMENTAL RECORD ON APPEAL PAUL S KELLY JR (SUGGESTIONS IN SUPPORT FILED BY 15188 ON 09-08-94) (SUGGESTIONS IN OPPOSITION FILED BY 17673 ON 09-15-94) **DENIED 10-28-94**
10-31-94		UNDER SUBMISSION

APPENDIX J

Mo. Rev. Stat. § 139.031

139.031. Payment of taxes under protest – action, when commenced, how tried – refunds, how made, may be used as credit for next year's taxes – interest, when allowed – collector to invest protested taxes, disbursal to taxing authorities, when. – 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.

2. The collector shall disburse to the proper official all portions of taxes not disputed by the taxpayer and shall impound in a separate fund all portions of such taxes which are in dispute. Except as provided in subsection 3 of this section, every taxpayer protesting the payment of taxes shall, within ninety days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the circuit court for the recovery of the taxes protested within the time prescribed in this subsection, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, and

any interest earned thereon, as provided above in this subsection.

3. No action against the collector shall be commenced by any taxpayer who has, for the tax year in issue, filed with the state tax commission a timely and proper appeal of the protested taxes. Such taxpayer shall notify the collector of the appeal in the written statement required by subsection 1 of this section. The taxes so protested shall be impounded in a separate fund and the commission may order all or any part of such taxes refunded to the taxpayer, or may authorize the collector to release and disburse all or any part of such taxes in its decision and order issued pursuant to chapter 138, RSMo.

4. Trial of the action in the circuit court shall be in the manner prescribed for nonjury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest, together with any interest earned thereon, or to authorize the collector to release and disburse all or any part of the impounded taxes, and any interest earned thereon, to the appropriate officials of the taxing authorities. Either party to the proceedings may appeal the determination of the circuit court.

5. All the county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector, or shall credit against the taxpayer's tax liability in the following taxable year any real or personal property tax mistakenly or

erroneously levied against the taxpayer and collected in whole or in part by the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The governing body, or other appropriate body or official of the county or city not within a county, shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise.

6. No taxpayer shall receive any interest on any money paid in by him erroneously.

7. All protested taxes shall be invested by the collector in the same manner as assets specified in section 30.260, RSMo, for investment of state moneys. A taxpayer who is entitled to a refund of protested taxes shall also receive the interest earned on the investment thereof. If the collector is ordered to release and disburse all or part of the taxes paid under protest to the proper official, such taxes shall be disbursed along with the proportional amount of interest earned on the investment of the taxes due the particular taxing authority.

8. On or before March first next following the delinquent date of taxes paid under protest, the county collector shall notify any taxing authority of the taxes paid under protest which would be received by such taxing authority if the funds were not the subject of a protest. Any taxing authority may apply to the circuit court of the county or city not within a county in which a collector has impounded protested taxes under this section and, upon a satisfactory showing that such taxing authority would receive such impounded tax funds if they were not

the subject of a protest and that such taxing authority has the financial ability and legal capacity to repay such impounded tax funds in the event a decision ordering a refund to the taxpayer is subsequently made, the circuit court shall order, pendente lite, the disbursal of all or any part of such impounded tax funds to such taxing authority. The circuit court issuing an order under this subsection shall retain jurisdiction of such matter for further proceedings, if any, to compel restitution of such tax funds to the taxpayer. In the event that any protested tax funds refunded to a taxpayer were disbursed to a taxing authority under this subsection instead of being held and invested by the collector under subsection 7 of this section, such taxing authority shall pay the taxpayer entitled to the refund of such protested taxes the same amount of interest, as determined by the circuit court having jurisdiction in the matter, such protested taxes would have earned if they had been held and invested by the collector.

9. No appeal filed shall stay any order of refund, but the decision filed by any court of last review modifying the circuit court's or state tax commission's determination pertaining to the amount of refund shall be binding on the parties, and the decision rendered shall be complied with by the party affected by any modification within ninety days of the date of such decision. No taxpayer shall receive any interest on any additional award of refund, and the collector shall not receive any interest on any ordered return of refund in whole or in part.

APPENDIX K

IN THE SUPREME COURT OF MISSOURI

GENERAL MOTORS CORPORATION,	)	
Appellant,	)	Supreme Court No. ___
v.	)	WD #46246
CITY OF KANSAS CITY,	)	Consolidated with WD #46526
Respondent.	)	

APPELLANT'S APPLICATION FOR TRANSFER TO THE SUPREME COURT

(Filed March 15, 1995)

Pursuant to Missouri Supreme Court Rule 83.03, appellant General Motors Corporation ("GM") requests transfer of this case to the Missouri Supreme Court on the following grounds:

I. This case involves a question of general interest and importance – namely, whether the City of Kansas City (the "City") may deny a refund of unconstitutional taxes where the taxpayer has been deprived of a meaningful opportunity to seek a clear and certain remedy, and

II. The opinion of the Court of Appeals is contrary to the decisions in *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59 (Mo. 1974), and *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. banc 1988).

GM has been denied its property without due process of law in violation of the Fourteenth Amendment of the U.S. Constitution and the Constitution of the State of

Missouri. The City collected unconstitutional taxes from GM and has refused to refund those taxes. Missouri's statutory scheme and the available case law misled GM into believing that Mo. Rev. Stat. § 139.031.1 does not apply to city taxes and that a common law action was available to redress the unlawful taxation. GM pursued this common law remedy. Applying a recent Missouri Supreme Court case, the Court of Appeals held that GM had no remedy whatsoever because it had not paid the taxes under protest in accordance with § 139.031.1. As a result, GM has been deprived of any meaningful opportunity to seek a clear and certain remedy for the unlawful taxation, in violation of the Fourteenth Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court in *Reich v. Collins*, 115 S.Ct. 547 (1994), and *McKesson v. Div. of Alcoholic Beverages*, 496 U.S. 18 (1990) and in violation of Article I, § 10 of the Missouri Constitution.

Moreover, the Court of Appeals held that § 139.031 provides the exclusive remedy for unlawful taxation. This is contrary to the holdings of *John Calvin Manor v. Aylward*, 517 S.W.2d 59 (Mo. 1974), and *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. banc 1988).

Appellant discusses the foregoing reasons for transfer more fully in its suggestions in support of this application, filed herewith.

WHEREFORE, for the foregoing reasons and for the reasons expressed in the accompanying suggestions in support, appellant General Motors Corporation respectfully requests that this case be transferred to the Supreme

Court of Missouri to review the opinion of the Court of Appeals.

Respectfully submitted,

/s/ Russell D. Jones
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ATTORNEYS FOR APPELLANT

APPENDIX L

IN THE SUPREME COURT OF MISSOURI

GENERAL MOTORS CORPORATION,	)	
Appellant,	)	Supreme Court No. ___
v.	)	WD #46246
CITY OF KANSAS CITY,	)	Consolidated with WD #46526
Respondent.	)	

SUGGESTIONS IN SUPPORT OF APPELLANT'S APPLICATION FOR TRANSFER TO THE SUPREME COURT

(Filed March 15, 1995)

From 1985 through 1988, the City collected from GM certain occupational license taxes which the Court of Appeals held to violate the Commerce Clause. However, the Court of Appeals subsequently decided that GM was not entitled to a refund of the unconstitutional taxes because GM did not pay the taxes under protest in accordance with Mo. Rev. Stat. § 139.031.1. It is that decision which GM contends is in error.

Procedural History

On December 29, 1989, GM filed a petition in the Circuit Court of Jackson County, Missouri at Kansas City seeking to recover certain license taxes which it had paid the City from 1985 through 1988, and arguing, among other things, that those taxes violated the Commerce Clause of the U.S. Constitution.

The City moved for dismissal, arguing that GM had been required by Mo. Rev. Stat. § 139.031 to pay the license taxes under protest and had failed to do so. The trial court denied the motion, holding that "Section 139.031 does not apply to Cities." Ultimately, the trial court entered summary judgment in favor of the City, holding that the license taxes did not violate the Commerce Clause.

Before the Court of Appeals, the City again moved to dismiss, contending that the Court of Appeals did not have jurisdiction to hear GM's appeal because the case involves the interpretation of a revenue statute – § 139.031. The Appeals Court, however, held that § 139.031 does not apply to cities and denied the City's motion. The court then ruled on the merits, holding that the license taxes did violate the Commerce Clause and remanding the case for further proceedings. See *Court of Appeals Opinion* dated February 22, 1994.

The City then applied to this Court for transfer to review the Appeals Court's Commerce Clause decision. On August 15, 1994, this Court accepted transfer of this case and simultaneously retransferred it to the Court of Appeals with instructions to reconsider the Appeals Court's decision in light of *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. banc 1994). In *Armco*, this Court held that the City could not impose an occupation license tax on "natural gas consumers." In dicta, the Court also stated – for the first time – that the protest procedure of § 139.031.1 applies to municipal taxes. Ironically, the City argued in *Armco* that the protest and escrow procedures of § 139.031 did not apply to cities.

On January 10, 1995, the Court of Appeals affirmed the original summary judgment for the City, but on the new ground that § 139.031 had been GM's exclusive remedy. On February 28, 1995, the Court of Appeals denied GM's motion for rehearing and for transfer to the Supreme Court.

Discussion

I. Question of General Interest and Importance – Denial of Due Process.

Prior to this Court's decision in *Armco* in 1994, it was generally believed[1] that § 139.031 did not apply to cities and that a common law action to recover illegally collected municipal taxes was available to a taxpayer. Although the Supreme Court declared in *Armco* that § 139.031 does apply to cities, the statute cannot be applied to GM in this case because that would deprive GM of its constitutional right to a clear and certain remedy for unconstitutional taxation. See discussion of *Reich v. Collins*, below. Accordingly, this case must focus not on what the law is now, but on what a reasonable taxpayer would have believed the law to be in the late 1980's.

The organization of Missouri's statutory scheme seemed to indicate that § 139.031 did not apply to city taxes. The Court of Appeals noted that "the overall legislative scheme of Missouri tax laws demonstrates that Chapter 139 is inapplicable to cities. The statutes

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[1] For instance, the history of this case shows that the City, the trial court, and the Court of Appeals all believed prior to *Armco* that § 139.031 does not apply to cities.

included in Chapters 89 through 99, RSMo, are uniquely applicable to cities. . . . In contrast, the statutes contained in Chapters 136 to 141 apply to the collection of state and county taxes." *Court of Appeals Opinion* dated February 22, 1994 at 8.

Case law available at the time reinforced the conclusion that § 139.031 is inapplicable to cities. In *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. banc 1988), this Court held that § 139.031.5 applies only to county tax collectors, which is consistent with the understanding of § 139.031 generally. Moreover, all other cases interpreting § 139.031 "consistently involve protests filed by taxpayers paying taxes collected by county collectors." *Court of Appeals Opinion* dated February 22, 1994 at 7.

Even if a taxpayer had understood that he *may* use § 139.031 to protest city taxes, the case law indicated that he was not *required* to. First, *Manufacturers Cas. Ins. Co. v. Kansas City*, 330 S.W.2d 263 (Mo. App. 1959), and similar cases allowed the recovery of invalid license taxes even if not paid under protest. Then, after the enactment of § 139.031, this Court stated, "It does not appear . . . that the legislature intended to abrogate those remedies existing prior to the enactment of sec. 139.031 nor to make the procedure set forth in sec. 139.031 the exclusive remedy available to a taxpayer." *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59, 63 (Mo. 1974). See also *Crest Communications, supra.* Moreover, faced with a protest procedure similar to § 139.031, this Court held that the procedure was not the exclusive path to relief. " 'That section- . . . merely prescribes a procedure by which a taxpayer may pay city taxes under protest. . . . It does not purport, even by inference, to condition the right to refund of

illegal or improper taxes on the filing of such a protest.' " *Naegele Outdoor Advertising v. Kansas City*, 509 S.W.2d 128, 130 (Mo. 1974) (quoting the trial court in that case). This is consistent with the language of § 139.031 which states that a taxpayer "may" protest, not that he must.

In *McKesson v. Div. of Alcoholic Beverages*, 496 U.S. 18 (1990), the U.S. Supreme Court held that a taxpayer is constitutionally entitled to a "*meaningful* opportunity" to obtain a "*clear* and certain" remedy to recover illegally collected taxes (emphasis added). Furthermore, that Court recently held that where a taxpayer reasonably believed that a certain remedy was available and the state courts subsequently denied its availability, declaring that a foregone remedy had been exclusive, the taxpayer was thereby deprived of a meaningful opportunity to obtain a clear and certain remedy. *Reich v. Collins*, 115 S. Ct. 547 (1994). This type of "bait-and-switch," the Court held, denies the taxpayer due process. "[W]hat [the state] may not do . . . is hold out what plainly appears to be a 'clear and certain' post deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Id.* at 549.

Prior to *Armco*, it was reasonable for GM to believe that § 139.031 did not provide a remedy for illegal city taxes, much less an exclusive one, and to rely on the availability of a common law remedy. It was only after GM had paid its taxes and attempted to pursue its common law remedy that the Court of Appeals held that the § 139.031 remedy was exclusive and that the common law action was unavailable. Consequently, although the Court of Appeals held that the City's license tax was unconstitutional, GM has never had a meaningful opportunity

to seek a clear and certain remedy. Because GM has been denied due process – a fundamental right – this case deserves the attention of this state's highest court as a matter of general interest and great importance.

II. Contrary to Appellate Court Opinions – Exclusive Remedy.

In an apparent overreaction to *Armco,* the Court of Appeals' opinion holds that the remedy provided in § 139.031 is exclusive. This is contrary to decisions of this Court that have allowed relief without regard to § 139.031 where it would have been inequitable not to do so. See *John Calvin Manor, supra* ("It does not appear . . . that the legislature intended to abrogate those remedies existing prior to the enactment of § 139.031 nor to make the procedure set forth in § 139.031 the exclusive remedy available to a taxpayer."). See also *Crest Communications, supra* (holding that there was an "equitable action for refund" of illegal city taxes even though the taxpayer had not paid the taxes under protest).

WHEREFORE, for the foregoing reasons, GM respectfully requests that Appellant's Application for Transfer to the Supreme Court be granted.

Respectfully submitted,

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APPENDIX M

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GENERAL MOTORS CORPORATION, Appellant, v. CITY OF KANSAS CITY, MISSOURI, Respondent.	WD# 46246 Consolidated With WF[sic]# 46526

APPELLANT'S MOTION FOR REHEARING AND, ALTERNATIVELY, APPLICATION FOR TRANSFER TO THE SUPREME COURT

(Filed Jan. 25, 1995)

COMES NOW General Motors Corporation ("GM"), and moves the Court for a rehearing because, based on the Court's opinion dated January 10, 1995, it is obvious that the Court has overlooked or misinterpreted material matters of fact and law. The Court completely misinterpreted GM's argument when it stated at page 7 of the opinion that GM's argument is based on the premise that the Supreme Court's decision in *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. banc 1994) (hereafter referred to as "*Armco*") had the effect of reversing or overruling previous law. This was not GM's argument.

GM's argument is that its due process rights under the United States Constitution and the Constitution of the State of Missouri have been violated because GM has not been afforded a meaningful opportunity to obtain a clear

and certain remedy for the unconstitutional taxes collected from it. If *Armco* is applied retroactively *to this case*, GM will be denied its due process right because prior to that decision no reasonable taxpayer would have believed that Mo. Rev. Stat. § 139.031 was an available remedy for the recovery of unconstitutional taxes collected by the City. Indeed, the fact that this Court – as well as the trial court and the respondent City of Kansas City – did not believe that such section applied to city collectors demonstrates that no reasonable taxpayer would have believed that it was the exclusive remedy. Rather, a taxpayer would have reasonably believed, as this Court did, that a common law action was an available remedy. A state cannot lead a taxpayer to believe he has a remedy and then take that remedy away after illegally collected taxes have been paid; to do so violates the taxpayer's due process rights.

Further, the Court overlooked the fact that Section 139.031 was not raised by the City as a defense to its liability to GM for the recovery of the taxes but was raised only by the City in a challenge to the jurisdiction of this Court.

The City's original Answer did not raise Section 139.031 (Record on Appeal, Section 2). The City did, however, file with the trial court a motion to dismiss based on Section 139.031 (Record on Appeal, Section 8). The trial court overruled that motion (Record on Appeal, Section 12) and the City requested leave to amend its Answer to aver the applicability of Section 139.031 (Record on Appeal, Section 13). This motion was overruled (Record on Appeal, Section 21) and no appeal was taken.

Consequently, the applicability of Section 139.031 was not before the Court as a defense by the City to GM's claim but only on the jurisdictional issue.

For the above stated reasons, supplemented by the suggestions filed in support hereof, GM respectfully requests the Court to grant a rehearing.

Alternatively, pursuant to Missouri Supreme Court Rule 83.02 GM moves the Court to transfer this case to the Supreme Court of Missouri because the serious federal and state constitutional questions involved raise issues of general interest and great importance and this case presents a question of existing law which should be reexamined.

Respectfully submitted,

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I hereby certify that a copy of the above and foregoing was hand-delivered , this 25th day of January, 1995, to:

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APPENDIX N

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GENERAL MOTORS CORPORATION,	)	
Appellant,	)	WD #46246 Consolidated with WD #46526
v.	)	
CITY OF KANSAS CITY,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING AND, ALTERNATIVELY, APPLICATION FOR TRANSFER TO THE SUPREME COURT

(Filed Jan. 25, 1995)

I. INTRODUCTION

Pursuant to Missouri Supreme Court Rule 84.17, Appellant General Motors Corporation ("GM") moves this Court for a rehearing because, based on the Court's most recent opinion, it appears that the Court has overlooked or misinterpreted material matters of fact and law. Namely, GM contends that the Court has not considered its argument that the City of Kansas City (the "City") has denied GM due process of law in violation of the Fourteenth Amendment of the United States Constitution and the Constitution of the State of Missouri. Because Missouri's statutory scheme regarding the recovery of unconstitutionally collected taxes is misleading, GM cannot be considered to have had notice, prior to the Supreme

Court's decision in *Armco Steel v. City of Kansas City*,[1] that Mo. Rev. Stat. § 139.031 provided an available – and, indeed, exclusive – remedy for the payment of unconstitutional taxes assessed by the City. Because there appeared to be no statutory remedy, GM relied on the availability of a common law action by which to seek relief. After GM had paid its taxes and sought its remedy, the *Armco* decision announced an unexpected and unforeseeable interpretation of § 139.031, thereby eliminating GM's common law action. Thus, GM has not had a meaningful opportunity to obtain a clear and certain remedy for the unconstitutional deprivation it suffered, and GM has been denied due process of law.

Alternatively, pursuant to Missouri Supreme Court Rule 83.02, GM moves this Court to transfer this case to the Supreme Court of Missouri. GM believes that its argument raises issues of general interest and great importance, and that it presents a question of existing law which should be reexamined.

II. PROCEDURAL HISTORY

In this case, GM seeks a refund of certain occupational license taxes assessed and collected by the City from 1985 through 1988 because the collection of those taxes was unconstitutional. The trial court held in favor of the City, declaring that the taxes at issue did not violate the U.S. Constitution. On appeal, this court reversed, holding that the tax as applied to GM violates the Commerce Clause. In response to the City's argument

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[1] 883 S.W.2d 3 (Mo. banc 1994).

disputing this Court's jurisdiction to hear GM's appeal, this Court further held that this case does not involve the construction of a Missouri revenue statute because, under existing law, Mo. Rev. Stat. § 139.031 does not apply to municipal taxes. Therefore, the Court held, GM was not required to pay the illegal taxes under protest, and the Court of Appeals had jurisdiction to hear the appeal on the license tax's constitutionality.

Upon the City's motion, the case was transferred to the Missouri Supreme Court, which subsequently retransferred the case to this Court for reconsideration in light of the Supreme Court's recent decision in *Armco Steel v. City of Kansas City, Missouri,* 883 S.W.2d 3 (Mo. banc 1994). Dicta in the *Armco* opinion declared, for the first time, that the protest provisions of § 139.031 apply to municipal taxes. Upon the retransfer, this Court applied the *Armco* dicta to the present case and held that the City is not required to refund the unconstitutional taxes because GM did not comply with the protest requirements of § 139.031.

It should be noted, however, that the only issues on appeal concerned whether the license tax applied to GM was constitutional, and the Court decided those issues in GM's favor. The City never appealed the trial court's ruling against it on the § 139.031 issue (see Record on Appeal, §§ 8, 12), and therefore that issue was before this Court only as a jurisdictional question. *Court of Appeals Opinion* dated February 22, 1994 at p. 6 fn.2. *See In Re Marriage of Allison,* 649 S.W.2d 566, 567 (Mo. App. 1983) ("Since [the party] did not appeal from the trial court's order dismissing his motion, he cannot raise the issue in his brief as a matter for review.") When the Missouri

Supreme Court retransferred the case in light of *Armco*, GM moved the Court for leave to brief the issue and to supplement the record. GM's motion was denied.

GM does not assert that *Armco* reversed or overruled previous law, and GM certainly does not claim that it was merely "unaware" or "ignorant of the law[2]." Rather, GM argues that, prior to elucidation by the *Armco* decision, the Missouri statutory scheme and related case law were so misleading that a reasonable taxpayer in GM's position could not be considered to have been on notice that the exclusive remedy of § 139.031 applies to payers of unlawful municipal taxes. As a result, the refusal of the City to refund the unconstitutional taxes[3] violates the Due Process Clause of the Fourteenth Amendment because the City has not afforded GM a "clear and certain remedy" for the wrongful deprivation of its property.

III. DISCUSSION

In the present case, Missouri's misleading statutory scheme with regard to taxpayer remedies led GM, as a reasonable taxpayer, to believe that the protest procedure of § 139.031 does not apply to municipal taxes and to

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[2] Contrary to the Court's assertion, "ignorance of the law" *has* been held to be an excuse where a court has articulated a legal principle "that had not been previously recognized but which is held to have retroactive application." *Reed v. Ross*, 468 U.S. 1, 17 (1984).

[3] As noted above, this Court previously decided that the City's license tax, as applied to GM, violated the Commerce Clause of the U.S. Constitution. There is no reason to believe that the Supreme Court's retransfer disturbed that holding.

believe that common law remedies to recover unconstitutional taxes remained available. It was only after GM had paid the taxes and filed suit to recover them that § 139.031 was clarified and interpreted in such a way as to eliminate the remedies GM reasonably relied upon. It is this kind of "bait and switch" of remedies that, according to a recent U.S. Supreme Court decision, denies due process under the Fourteenth Amendment. *See Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547 (1994).

A. The Bait: A reasonable taxpayer would not have notice that § 139.031 applies to municipal taxes, and would have relied on the availability of common law causes of action.

Missouri's statutory scheme was misleading with regard to the applicability of § 139.031 because it appeared, based on careful consideration of the text, the organization of the statutes, and the available case law, that § 139.031 did not apply to cities. Thus, GM could not be considered to have been on notice that it was required to pay unlawful license taxes under protest. Rather, if the statute did not apply to municipal taxes, a reasonable taxpayer would conclude that a common law action was the appropriate method for seeking a refund of unconstitutional city taxes. GM relied on the availability of that common law remedy to redress its unlawful deprivation.

In its earlier decision, this Court itself concluded that § 139.031 does not apply to municipal taxes. In its opinion, the Court pointed out some of the many factors which lead to that conclusion:

> [T]he overall legislative scheme of Missouri tax laws demonstrates that Chapter 139 is inapplicable to cities. The statutes included in Chapters 89 through 99, R.S.Mo., are uniquely applicable to cities. Chapters 92, 93 and 94 specifically relate to taxation by cities. Sections 92.040, 92.045 and 94.110 contain the authorization for cities to collect license taxes on businesses. In contrast, the statutes contained in Chapters 136 to 141 apply to the collection of state and county taxes. Even though some provisions of Chapter 140 are applicable to cities, these provisions are limited to the collection of delinquent real estate taxes and do not apply to other types of taxes.

Court of Appeals Opinion dated February 22, 1994 at p. 8. This Court further noted that "the administrative procedure for protesting the payment of taxes requires the filing of a timely and proper appeal of the protested tax with the state tax commission," and that the state tax commission has no authority over city taxes. *Id.* at p. 7. Moreover, this Court noted that the Missouri Supreme Court's opinion in *Crest Communications v. Kuehle*[4] declared that a subsection of § 139.031 applies only to *county* collectors, and that all other cases interpreting § 139.031 "consistently involve protests filed by taxpayers paying taxes collected by *county* collectors." *Court of Appeals Opinion* dated February 22, 1994 at p. 7 (emphasis added). Like GM, the Court of Appeals was led by the misleading statutory scheme and available case law to conclude that "[s]ince § 139.031 is inapplicable, the statute *obviously* does not act as a bar to GM's recovery." *Id.* at p. 8 (emphasis added). Likewise, the trial court held

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[4] 754 S.W.2d 563 (Mo. banc 1988).

that "[s]ection 139.031 does not apply to Cities" in its Order denying the City's Motion to Dismiss. Record on Appeal, § 12.

Not only were GM, the trial court, and the Court of Appeals misled, but the City itself appears to have been confused as to the applicability of § 139.031. The City argued in *Armco* that "§ 139.031 applies only to the assessment of taxes collected by 'county collectors,' " apparently desiring not to impound the taxes illegally collected in that case. 883 S.W.2d at 7. Thus, if a taxpayer in GM's position were to have consulted the City as to whether the statute applied, it appears as likely as not that the City would have indicated it does not apply, and it is probable that the City would not have complied with the statute and impounded the funds.

The problem with expecting GM or any other taxpayer to have realized that § 139.031 was its exclusive remedy with respect to unconstitutional license taxes is amplified by the fact that, even if it had been a known remedy, it appeared from its text and the available case law that it was not exclusive. The statute itself states that a taxpayer "may" protest, not that it must. Furthermore, the case law available during the relevant time asserted that "[i]t does not appear . . . that the legislature intended to abrogate those remedies existing prior to the enactment of § 139.031 nor to make the procedure set forth in § 139.031 the exclusive remedy available to a taxpayer." *John Calvin Manor, Inc. v. Aylward*, 517 S.W. 2d 59, 63 (Mo. 1974). *See also, B&D Investment Co., Inc. v. Schneider*, 646 S.W. 2d 759, 762 (Mo. banc 1983) ("[T]he availability of an administrative remedy does not bar other remedies under all circumstances."); *Crest Communications v. Kuehle*, 754

S.W. 2d 563, 566 (Mo. banc 1988) (following *John Calvin Manor* and distinguishing *B&D Investment*).[5]

Given all of these factors, it cannot be said that GM had sufficient notice of the protest requirements so as to have been given a "*clear* and certain remedy" as required by the Due Process Clause. See *McKesson v. Div. of Alcoholic Beverages*, 496 U.S. 18, 39 (1990). Surely it is unreasonable to expect a taxpayer to anticipate, *better than the Missouri Court of Appeals*, the direction the Supreme Court will take a misleading and previously uninterpreted statute – even more so where the result is the ratification of a multi-million dollar unconstitutional deprivation.

It has long been held that this kind of statutory surprise is itself at odds with the U.S. Constitution. In *Connally v. General Const. Co.*, 269 U.S. 385 (1926), the U.S. Supreme Court stated:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Id. at 391. Accordingly, the Missouri Supreme Court has consistently applied the same principle. *State ex rel. Nixon*

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[5] Moreover, faced with a protest procedure similar to § .031, the Missouri Supreme Court held that the procedure was not the exclusive path to relief. " 'That section . . . merely prescribes a procedure by which a taxpayer may pay city taxes under protest and sets forth administrative steps concerning how the protest must be made . . . It does not purport, even by inference, to condition the right to [sic] refund of illegal or improper taxes on the filing of such a protest.' " *Naegele Outdoor Advertising v. Kansas City*, 509 S.W. 2d 128, 130 (Mo. 1974).

v. Telco Directory Pub., 863 S.W.2d 596, 600 (Mo. banc 1993) ("Persons cannot fairly be required to obey a law so unclear in its terms that it provides no notice of its scope."); *State ex rel. Mo. State Bd. of Registration v. Southworth*, 704 S.W.2d 219, 223 (Mo. banc 1986) ("The 'void-for-vagueness' doctrine is applicable to civil as well as criminal cases."); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. banc 1982); *Missouri Pacific Railroad Co. v. Morris*, 345 S.W.2d 52, 57 (Mo. banc 1961) ("In the exercise of the taxing power, which is the very essence of sovereignty, and of the gravest consequences to the citizen, there ought to be no ambiguity or uncertainty in the language of the law.").

GM is not claiming that § 139.031 is void-for-vagueness. Rather, it is GM's position that, like laws that are void-for-vagueness, the statutory scheme and judicial pronouncements respecting the availability of remedies for the recovery of unlawfully collected taxes were collectively so misleading that they failed to put municipal taxpayers on notice that they must protest unlawful city taxes in order to seek a refund.

The effect of this obfuscation is that it led a reasonable taxpayer to believe that other remedies were available. Since the state must provide "meaningful backward-looking relief"[6] for unlawfully collected taxes and no other statute provides such a remedy with regard to municipal taxes, one would have concluded that the common law cause of action for refund which was employed

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[6] *McKesson v. Div. of Alcoholic Beverages*, 496 U.S. 18, 31 (1990).

in *Manufacturers Casualty Insurance Co. v. Kansas City*[7] and similar cases was the appropriate method to challenge city taxes.[8]

B. The Switch: The Missouri Supreme Court declared, for the first time, that § 139.031 is the exclusive remedy for unconstitutional municipal taxes and removed the possibility of a common law cause of action only after GM's taxes had been paid thus denying GM a "clear and certain" remedy.

The relevant portions of § 139.031 were enacted in 1969. GM paid the disputed taxes from 1985 to 1988, and filed the present action in 1989. It was not until 1994, however, that the Supreme Court finally announced that § 139.031 applies to municipal taxes as an "issue of first impression." Thus, "[a]t the time GM paid the city occupational license taxes, *Armco* had not been decided by the Supreme Court and earlier cases had not dealt with the issue." *Court of Appeals Opinion*, dated January 10, 1995 at p. 7. In other words, after the state had "hidden the ball" with a confusing scheme of statutes and judicial decisions for twenty-five years and after GM relied upon the apparent availability of a common law remedy, the Supreme

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[7] 330 S.W.2d 263 (Mo.App. 1959).

[8] Apparently, this Court was under the same impression. "In the absence of a statute which supersedes the common law, the common law provides the right to a refund when the invalid or illegal taxes are paid involuntarily or under coercion or duress." *Court of Appeals Opinion* dated February 22, 1994 at p. 20.

Court suddenly and unexpectedly swept away GM's reasonable expectations. As a result, GM is left without meaningful relief, without a clear and certain remedy, and without the roughly $3.3 million GM was required to pay in violation of the U.S. Constitution.

C. Due Process: By requiring GM to pay unconstitutional taxes and then denying GM the remedy it reasonably believed was available, the City has deprived GM of its property without due process of law in violation of the Fourteenth Amendment.

"To satisfy the requirements of the Due Process Clause, . . . the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *McKesson v. Div. of Alcoholic Beverages*, 496 U.S. 18, 39 (1990) (footnote and citation omitted). GM's argument is illustrated by a recent case, *Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547 (1994), in which the U.S. Supreme Court held that the State of Georgia did not provide a meaningful remedy where the taxpayer had reasonably believed that a certain remedy was available and the state courts subsequently denied its availability and declared that a long-since foregone remedy had been the taxpayer's only chance to redress the unlawful tax. That is precisely the situation in the present case, and the City's refusal to grant a refund, like Georgia's, violates the Due Process Clause of the Fourteenth Amendment.

In *Reich*, the Court found that "Georgia held out what plainly appeared to be a 'clear and certain' post-deprivation remedy, in the form of its tax refund statute, and then declared, only after [plaintiff] and others had paid the disputed taxes, that no such remedy exists." *Id.* at 550. The Court referred to this tactic as a "bait and switch." *Id.* at 550. The unfairness lies in the fact that "*no reasonable taxpayer* would have thought that [the foregone procedure] represented, in light of the apparent applicability of the [relied-upon procedure], the *exclusive remedy for unlawful taxes.*" *Id.* at 550 (emphasis added).

The present case is directly analogous to *Reich*, and perhaps presents an even better argument. In *Reich*, the plaintiff knew of the "exclusive" remedy, but decided to forego it because he believed another remedy was available. In GM's situation, however, a reasonable taxpayer – not to mention the Court of Appeals – would not have anticipated that § 139.031 was an available remedy *at all*, much less the exclusive remedy. Because of the "bait and switch" of remedies, GM has not had a meaningful opportunity to seek a clear and certain remedy and, by means of an unconstitutional tax, is being deprived of over three million dollars without due process of law.

IV. CONCLUSION

Ultimately, due process is about fairness, and GM has not been treated fairly. GM has never had a meaningful opportunity to obtain a clear and certain remedy for its unconstitutional deprivation. No reasonable taxpayer would have thought, prior to *Armco*, that § 139.031 provided an available remedy for unlawfully collected municipal taxes – much less the exclusive remedy. In fact,

the trial court and Court of Appeals determined that § 139.031 was inapplicable, and it seems unreasonable to require a taxpayer to divine the operation of misleading statutes more accurately than the state courts. GM was thus led to believe that a common law remedy was available to redress the unlawful collection of city taxes. After GM had paid its taxes and looked to its remedy, however, the Supreme Court suddenly and unexpectedly swept away GM's remedy and declared that a long-gone procedure had been GM's only chance for relief. Thus, by direct analogy to *Reich v. Collins*, it is clear that GM has been denied the due process of law that is guaranteed by the U.S. and Missouri constitutions.

Accordingly, GM moves this Court for a rehearing because it appears from the Court's opinion that the Court has overlooked or misinterpreted GM's due process argument.

Alternatively, GM moves the Court to transfer this case to the Supreme Court of Missouri because GM's due process argument raises issues of general interest and great importance, and it presents a question of existing law which should be reexamined.

Respectfully submitted,

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Attorney for Appellant

APPENDIX O

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GENERAL MOTORS CORPORATION,	)	
Appellant,	)	WD# 46246 Consolidated With WD# 46526
v.	)	
CITY OF KANSAS CITY, MISSOURI,	)	
Respondent.	)	

MOTION TO SUPPLEMENT THE RECORD, TO FILE ADDITIONAL BRIEFS AND TO REARGUE THE CASE

(Filed Sept. 8, 1994)

COMES NOW General Motors Corporation, appellant herein, and moves the Court for an order permitting it to supplement the record, to file additional briefs, and to reargue the case for the following reasons.

1. The Supreme Court of Missouri on August 15, 1994, sustained the respondent's motion to transfer and then retransferred the case to this Court for reconsideration in light of *Armco Steel, et al. v. City of Kansas City, Missouri, et al.*, No. 76094.

2. The decision in *Armco* raises issues that were not briefed or argued before this Court as more fully set forth in the suggestions in support of this motion which are being filed concurrently with this motion.

WHEREFORE, appellant moves the Court for an order permitting it to supplement the record, to file additional briefs, and to reargue the issue of whether the appellant must be permitted to pursue this litigation in order to have an opportunity for meaningful relief from the illegal taxes collected by respondent City, and whether the appellant is entitled to recover those illegally collected taxes under the special circumstances of this case.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

APPENDIX P

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GENERAL MOTORS CORPORATION,	)	
Appellant,	)	WD# 46246 Consolidated With WD# 46526
v.	)	
CITY OF KANSAS CITY, MISSOURI,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF APPELLANT'S MOTION TO SUPPLEMENT THE RECORD, TO FILE ADDITIONAL BRIEFS AND TO REARGUE THE CASE

(Filed Sept. 8, 1994)

The Supreme Court of the United States in *McKesson v. Division of Alcoholic Beverages & Tobacco*, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990) unanimously held that the due process clause of the United States Constitution requires that when a state collects illegal taxes, it must provide a "clear and certain remedy" by which a taxpayer may obtain "meaningful relief."

Until the Missouri Supreme Court's decision in *Armco* on August 15, 1994, it was generally believed that Section 139.031.1 Mo. Rev. Stat. did not apply to city tax collections. *See* this Court's opinion in this case at pages 5-9 inclusive and the position of the respondent City in *Armco* as set forth in the Missouri Supreme Court's opinion in that case at pages 9-10. Thus, at the time appellant paid city occupational license taxes it did not have any

notice, indeed it did not have any way to know, that it was allowed to avail itself of the procedures of Section 139.031.1.[1]

In addition, although it is now clear under *Armco* that at least some of the provisions of Section 139.031 Mo. Rev. Stat. apply to city tax collections, it is also clear under

---

[1] The general belief – shared by appellant, respondent City, and this Court – that Section 139.031.1 Mo. Rev. Stat. did not apply to city taxes was reasonable in view of several factors. Among other things, Chapter 139 of the revised statutes is the third in a series of four chapters of the statutes that appear to deal virtually exclusively with real estate and personal property taxes. In contrast, Chapters 71 (Sections 71.610 through 71.670) and 92 through 94 of the statutes generally deal with city taxes.

In addition, Section 139.031.1 has always been referred to by the Missouri Supreme Court in the context of property taxes. *See, e.g., B&D Investment Co., Inc. v. Schneider,* 646 S.W.2d 759, 762 (Mo. banc 1983) (in discussing the meaning of Section 139.031 the Court said: "*Section 139.031,* which was a new section when adopted in 1969, *must be reconciled with the remedies available* to a taxpayer *against* the imposition of *invalid property taxes* existing at the time of its adoption [citation omitted].") (emphasis added); *Crest Communications v. Kuehle,* 754 S.W.2d 563, 567 (Mo. banc 1988) (acknowledging that Section 139.031.5 applies only to county, and not to city, taxes).

Moreover, like the Supreme Court, commentators have universally treated Section 139.031.1 only in the context of property taxes. *See, e.g.,* Prugh, "Property Tax Appeals in Missouri: New Procedures Effective in 1983," 40 *Journal of the Missouri Bar* 23, 26 (1984) ("*Property taxes* in Missouri are due and payable by December 31 of each year [citation omitted]. *Under the provisions of Chapter 139,* RSMo, taxes which are the subject of a pending administrative or judicial appeal by the taxpayer are also required to be paid under protest to the collector.") (emphasis added).

Missouri law that this section does not provide an exclusive remedy for taxpayers from whom taxes have been unconstitutionally exacted. Section 139.031 Mo. Rev. Stat. itself, in subsection one, states that a taxpayer "may" protest taxes assessed against it, and does not state that a taxpayer "must" or "shall" in all instances protest taxes in order to maintain an action against a collector for a refund. *See also B&D Investment Co., Inc. v. Schneider,* 646 S.W.2d 759, 762 (Mo. banc 1983) ("[T]he availability of an administrative remedy does not bar other remedies under all circumstances."); *Crest Communications v. Kuehle,* 754 S.W.2d 563, 566 (Mo. banc 1988) ("Defendants' contention that all equitable remedies were abrogated by the enactment of § 139.031 is contrary to *John Calvin Manor* and based upon an incorrectly expansive reading of *B&D Investments*. . . . ").

Finally, this Court held in *Manufacturers Casualty Ins. Co. v. Kansas City,* 330 S.W.2d 263 (Mo. App. 1959) that where taxes are paid under duress, which was the situation in the case at bar, the taxpayer is entitled to a refund of taxes.

It is appellant's position that it must be permitted to pursue this litigation in order to have an opportunity to obtain meaningful relief, including a clear and certain remedy, as required under the due process clause of the United States Constitution. Appellant contends that Section 139.031.1 did not constitute such an opportunity or remedy in this case because it was not until August 15, 1994, when the Missouri Supreme Court handed down its decision in *Armco,* that it was even possible to know that Section 139.031.1 applied to city tax collectors. Further, it is appellant's position that Section 139.031.1 is not the

exclusive remedy for unconstitutionally collected taxes under Missouri law, and that under the circumstances of this case the appellant should be permitted to seek redress under the doctrine of *Manufacturers Casualty Ins., supra.*

As indicated above, appellant's position that it is entitled to an opportunity for meaningful relief, including a clear and certain remedy, is based in large part on the United States Constitution as interpreted in *McKesson.* In addition, however, it is based on Missouri law. *See B&D, supra,* at 762 ("Of course, when because of lack of notice a taxpayer is denied an opportunity to employ an administrative remedy, he will not be denied a judicial remedy."). Indeed, the Missouri Supreme Court has afforded taxpayers in a variety of circumstances an opportunity to obtain redress for illegally collected taxes other than pursuant to Section 139.031.1, and apparently has never denied the availability of another remedy where Section 139.031.1 did not afford effective relief to the taxpayer. *See, e.g., John Calvin Manor, Inc. v. Aylward,* 517 S.W.2d 59 (Mo. 1974) ("It does not appear, however, that the legislature intended to abrogate those remedies existing prior to the enactment of sec. 139.031 nor to make the procedure set forth in sec. 139.031 the exclusive remedy available to a taxpayer."). *See also Crest Communications, supra; Ingels v. Noel,* 804 S.W.2d 808 (Mo. App. 1991).

The foregoing issues were not addressed by the Court in the original appeal of this case, which only ruled on the issue of the jurisdiction of the Court of Appeals as raised by the respondent herein.

Consequently, appellant requests the Court to permit it to supplement the record by permitting certified copies of pleadings filed by the respondent City in the *Armco* case showing that (1) the City did not believe that Section 139.031.1 applied to city collectors and (2) the City did not follow the practice of impounding in a separate fund all taxes which are protested, as required by subsection two of Section 139.031.

Further appellant requests an order of the Court permitting it to file supplemental briefing and to reargue the issues of (1) whether appellant must be permitted to pursue this litigation in order to have a clear and certain remedy and an opportunity for meaningful relief from the illegal taxes collected by respondent City from 1984 through 1988, as required by the due process clause of the United States Constitution under the holding of the United States Supreme Court in *McKesson* and by Missouri law under the holding of the Missouri Supreme Court in *B&D*, and (2) whether under *Manufacturers Casualty Ins. Co. v. Kansas City, supra*, appellant is entitled to recover the taxes unconstitutionally collected from it.

Respectfully submitted,

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Attorney for Appellant

APPENDIX Q

The following is a list of subsidiaries and partnerships (except wholly-owned subsidiaries or partnerships) of petitioner General Motors Corporation.

Subsidiaries

ACCSCO S.A.

AMBRAKE Corporation

ARINC Incorporated

Adela Investment Company S.A.

Aeronautical Systems Designers Limited

AeroVironment, Inc.

Agora s.r.l.

Alambrados y Circuitos Electricos, S.A. de C.V.

Alpha Trans Leasing Verwaltungsgesellschaft mbH

American Mobile Satellite Corporation
[publicly traded]

Anadolu Otomotiv Sanayi VE Ticaret A.S.

Applied Intelligent Systems, Inc.

Aralmex, S.A. de C.V.

Aristacom International, Inc.

Asset Leasing GmbH

Aura S.r.l.

Automotive Battery Manufacturing, Inc.

Autos y Maquinas del Ecuador S.A.

Avis, Inc.

BSS Belgique

BSS Greece

Banque Opel

Basintel S.p.A.

Beijing International Information Processing Company Limited

Beijing WY-GM Automotive Electronic Control Co., Limited

Bujias Mexicanas, S.A. de C.V.

CAMI Automotive, Inc.

CCII S.A.

CEI Co., Ltd.

CLIOR

CLS Corporation

COGSYS Limited

Calsonic Harrison Co., Ltd.

Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG

Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG

Centro Tecnico Herramental, S.A. de C.V.

China Management Systems Corporation

Cilva Holdings Plc.

Cimflex Teknowledge

Coalition Undertaking Remedial Efforts, Inc.

Comlinear Corporation

Compagnie de Faisceaux Tunisiens International S.A.

Compania Nacional de Direcciones Automotrices, S.A. de C.V.

Componentes Delfa, C.A.

Comtrac Corporation

Controladora General Motors, S.A. de C.V.

Controladora Mexicana de Autopartes, S.A. de C.V.

Convenient Automatic Transaction System

Convergent Corporation

Convergent Group Corporation

DHB America Inc.

DHB Componentes Automotivios S.A.

DRB s.a./n.v.
(a/k/a Delco Remy Belguique)

Daewoo Automotive Components, Ltd.

Delco Products Sucursal Esponola

Delco Products Suspension Systems Ltd.

Delkor Corporation

Delredo, S.A. de C.V.

Desarrollo y Servicios de Informatica y Communiciones, S.A. de C.V.

Detroit Diesel Corporation
[publicly traded]

Diavia Aire, S.A.

Diavia S.r.l.

Doug Fox Parking, Inc.

DR DE CHIHUAHUA, S.A. de C.V.

E.A.I. – Europe Assurance Informatique

EDESA Societe Anonyme Holding

EDS Africa Limited

EDS Hellas

EDS – Padcom Clinical Research Beterlilgungs GmbH

EDS Personal Communications Corporation

EDS – Defense Limited

EDS – Trustee Limited

ELEKLUFT Elektronik-und Luftfahrtgerate GmbH

Emperion Corporation

Empresa Mixta GEMACVEN, S.A.

Empresa Nacional de Optica SA

Empresas Ca-Le de Tlaxcala, S.A. de C.V.

Ensamble De Cubiertas Automotrices, S.A. De C.V.

Eurexel Associes S.A.

Europe Assurance Informatique

France Informatique Juridique

FLIR Systems, Inc.

Fabrica Nacional De Autobuses, C.A.

First Portland Technology Corp.

4th Dimension Software, Inc.

Fox Travel Institute, Inc. (The)

Freevale Limited

GCS Information Access Limited

GCS Limited

GEST'HELP Huissier

GFI-TB La Mondiale Bull S.A.

GM Investment Trustees Limited

GM Nigeria Limited

GM Ovonic L.L.C.

GM-Saab Communication GmbH

GMAC de Argentina S.A.

G.M.A.C. Financiera de Columbia S.A. Compania de Financiamiento Comercial

GMB Belgique

Genasys L.C.

General Motors de Argentina S.A.

General Motors Colomotores, S.A.

General Motors Egypt, S.A.E.

General Motors India Limited

General Motors Kenya Limited

General Motors OPEL Leasinggesellschaft m.b.H.

Genie Mecaniquie Zairois, S.A.R.L.

Guiado y Control SA

HBH Company

HESI-FTIC Environmental Service, Inc.

Healthco Holding Corporation

Hitachi Data Systems Holding Corporation

Hughes Airport Development Corporation Sdn Bhd

Hughes Escorts Communications Limited

Hughes-JVC Technology Corporation

Hughes-Kenwood RDSS, Inc.

Hughes Software Systems Private Limited

I. K. Coach Co., Ltd.

IBC Vehicles (Distribution) Limited

IBC Vehicles Limited

IBOS Management Company Limited

ICIM BV

ICR Internationale Consulting und Rechenzentrum GmbH

ITC Inland Teknik Oto Yan Sanayi Limited Sirketi

ITT Automotive Electrical Systems, Inc.
(a/k/a Electrical Systems, Inc.)

i-Logix Inc.

Industries Mecaniques Maghrebines, S.A.

Industrija Delova Automobila, Kikinda

Information Interchange Limited

Infosys

Institut des Techniques Avancees

Instituto R.S.O.

Insurance Software Solutions Corporation

Integrated Multimedia Solutions, Inc.

Interbank On-Line System Ltd.

International Electro-Optical Industry Anonim Sirketi

Istituto R.S.O.

Isuzu-General Motores Australia Limited

Isuzu Motors Limited
[publicly traded]

J.C.I.S. Co., Ltd.

Japan Network System

Japan Satellite Communications Network Corporation

Japan Systems Company Limited
[publicly traded]

Japan Systems Kabushiki Kaisha

Jinbei GM Automotive Co. Ltd.

K.C.E. Co., Ltd.

Kabeltrommel GmbH & Co. KG

Kabelwerke Reinshagen GmbH

Kabelwerke Reinshagen Werk Berlin GmbH
(a/k/a Kabelwerke Reinshagen Berlin Plant GmbH)

Kabelwerke Reinshagen Werk Neumarkt GmbH
(a/k/a Kabelwerke Reinshagen Neumarkt Plant GmbH)

Katcon, S.A. de C.V.

Klockner Datentchnik GmbH

Lenguajes y Servicios Informaticos, S.A.

Lufthansa Systems GmbH

MCE

Macopel, S.A. de C.V.

Management Computer Equipment S.A.

Management Technologies Inc.

Metal Casting Technology, Inc.

Microelectronics and Computer Technology Corporation

Millbrook Pension Management Ltd.

Natel Montique

Neodata Corporation

New Cure, Inc.

New United Motor Manufacturing, Inc.

New Venture Gear, Inc.

Nihon Game Cards

Nippon Avionics Co., Ltd.

Nippon EDS Co., Ltd.
(a/k/a Nippon EDS Kabushiki Kaisha)

Nishinihon Attene Computer Co., Ltd

OGIP ORGANISATION SARL

Omnibus BB Transportes, S.A.

One Touch Systems, Inc.

Opel-Automobilwerk Eisenach-PKW GmbH
(a/k/a Opel-AWE GmbH)

OPEL Bankgesellschaft m.b.H.

Opel France S.A.

Opel-Handler Versicherungsdienst GmbH

Opel Hungary Automotive Distribution Ltd.

Opel Hungary Automotive Manufacturing Ltd.

Opel-Wohnbau GmbH

Orion

Oy EDS Electronic Data Systems Ab

P. T. Mesin Isuzu Indonesia

PDES, Inc.

PT General Motors Buana Indonesia

PT. Pasifik Satelit Nusantara

Packard CTA Pty. Ltd.

Packard Electric Baicheng

Packard Electric Hebi

Packard Electric Vas kft

PADCOM Holding GmbH

Postal Buddy Corporation

Premida-Comercio, Gestao e Servicos, Lda.

PROGICAL/S.A.

Promotora de Partes Electricos Automotrices

Promotora S.A. de C.V.

Rio Bravo Electricos, S.A. de C.V.

Riser Foods, Inc.

Robotic Vision Systems, Inc.

Ruedas de Aluminio, C.A.

Sistemi & Technologie S.p.A.

SAFRI

SATECIA S.A.

SOAGE Milano S.r.l.

SOAGE S.r.l.

SONIA S.A.

SV-EDS Technology Services, Ltd.

SYSTER – Informatique

Saab Automobile AB

Saginaw Sucursal Espanola

Sapporo Attene Computer Co., Ltd.

Satelitron S.A. de C.V.

Senalizacion y Accesorios del Automovil Yorka, S.L.

Serampang Hughes sdn. Bhd.

Shi-Tsu World Company, Ltd.

Shinsung Packard Company, Ltd.

Simpad, Sociedad Anonima de Capital Variable (a/k/a Simpad, S.A. de C.V.)

Sipe Optimation S.p.A.

Sistemas de Asientos Para Vehiculos Automotrices, S.A. de C.V.

Sociedad Anonima de Teleinformatica para Cajas de Ahorros

Sociedad de Comercializacion Internacional Colomotores S.A.

Societe Auxiliaro Pour Le Financement et Les

Societe Flerieunne De Participations

Societe Francaise des Amortisseurs de Carbon S.A.

Spectra Securities Software Inc.

Standard Missile Company, L.L.C.

Subarban Limited Liability Company

Subaru-Isuzu Automotive, Inc.

Sung San Company, Ltd.

Suzuki Motor Corporation
[publicly traded]

Synon Italia s.r.l.

Systems & Management S.p.A.
(a/k/a Gruppo S&M)

Systems Technology Management Corporation

Technical Team S.A.

Telemac S.A.R.L.

Telemesures Acoustiques Telemac S.A.R.L.

Teramira Holdings, Inc.

The Gulf Industrial Technology Company (KSC)

Tokai Atene Computer Co., Ltd.

Translant, Inc.

2000 Aircraft Credit AB

U.M.I. Universal Motors Israel Ltd.

UMW-EDS Technologies Sdn. Bhd.

UKADGE Systems Limited

UPE Systems Services Sdn. Bhd.

United Australian Automotive Industries Limited

Uveral S.A.

Vanguarda Componentes Automotivos, S.A.

Vestiduras Fronterizas, S.A. de C.V.

Video Lottery Technologies, Inc.
[publicly traded]

View Engineering, Inc.

Volvo GM Canada Heavy Truck Corporation

Volvo GM Heavy Truck Corporation

Woodbridge Foam Deutschland, GMBH

Worldlink Marketing Pty Ltd.

Worldmater Marketing Pty Ltd.

YLYS Informatique

Partnerships

AMRAAM International Licensing Company

Earth Observation Satellite Company

G. & F. Company

GM-ARA Industrial Cleaning

H & D Radio Frequency Identification Products

H & R Company

HKV

Hughes-Pareto Research Partnership

IRISS Company

Low Emission Paint Research and Development Partnership

Low Emissions Technologies Research and Development Partnership

MLT Holding Limited Partnership

RALS
(a/k/a RAM Alternate Launcher System)

SJ & LA Associates

Supercomputer Automotive Applications Partnership

United States Automotive Materials Partnership

(8)

Supreme Court, U.S.
FILED
AUG 18 1995
CLERK

No. 95-125

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari
To The Missouri Court Of Appeals,
Western District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether jurisdiction lies with the Supreme Court under 28 U.S.C. §1257(a) when the federal question was first presented to the state intermediary court after the highest court of the State of Missouri issued a mandate to the state intermediary court?

2. Whether a due process violation occurs when a certain and clear statutory remedy is available prior to the adverse decision and the same remedy is available after the adverse decision?

RULE 29.1 LISTING

Petitioner General Motors Corporation has listed its parent and subsidiary companies in its Petition for a Writ of Certiorari. That listing is incorporated by reference.

Respondent City of Kansas City, Missouri is a municipal corporation with no parent or subsidiary companies and is a political subdivision of the State of Missouri.

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No. 95-125

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Western District

BRIEF IN OPPOSITION

OPINIONS BELOW

The Missouri Court of Appeals affirmed the trial court's grant of summary judgment in favor of the city in its opinion reported at 895 S.W.2d 59. The order of the Missouri Supreme Court retransferring the matter back to the Court of Appeals is unreported and appears as Appendix B to the Petition. The orders of the Missouri Supreme Court and of the Court of Appeals are unreported and appear as Appendices G and H to the Petition. The decision of the Court of Appeals is unreported and appears as Appendix C to the Petition. The original

decision of the trial court granting summary judgment in favor of the City appears as Appendix E to the Petition.

JURISDICTION

Respondent asserts that the Court lacks the jurisdiction Petitioner invokes under 28 U.S.C. §1257(a).

STATUTE INVOLVED

Mo. Rev. Stat. §139.031.1 (1986)

1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.

STATEMENT OF THE CASE

On December 29, 1989, Petitioner (hereinafter "GM") filed its lawsuit against the City of Kansas City, Missouri (hereinafter "City") alleging that the City's occupational license tax, as applied to GM, violated the Commerce Clause. The City moved to dismiss on the ground that GM's action was barred as it had not paid its taxes under protest in accord with Mo. Rev. Stat. §139.031 (1986). The

trial court denied this motion but granted summary judgment in favor of the City finding that the City's tax did not violate the Commerce Clause as applied to GM.

GM appealed to the Missouri Court of Appeals, Western District. Again, the City raised the issue that GM failed to pay its taxes under the protest provisions of Mo. Rev. Stat. §139.031 (1986) and both parties briefed the issue. On February 22, 1994, the Court of Appeals issued its opinion ruling against the City on the protest issue and finding that the City's tax as applied to Petitioner violated the Commerce Clause.

The City appealed to the Missouri Supreme Court. On August 15, 1994, the Missouri Supreme Court accepted the matter and retransferred it to the Western District Court of Appeals to be decided in light of *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. *banc* 1994). Petitioner filed no motion for reconsideration of that decision.

On January 10, 1995, the Court of Appeals, after denying Petitioner's motion for opportunity for additional briefing and argument of the case, ruled that GM's failure to pay the taxes under protest barred its right to recovery and affirmed the trial court's grant of summary judgment in favor of the City. GM's subsequent Motion for Rehearing was denied by the Court of Appeals and the Missouri Supreme Court denied GM's Application for Transfer.

REASONS FOR DENYING THE WRIT

The Supreme Court lacks jurisdiction in this matter as the federal question Petitioner presents was not presented nor addressed in the state courts even though the claim was available and should have been raised. The parties fully briefed and argued the applicability of the protest provisions of Mo. Rev. Stat. §139.031 (1986) and yet, Petitioner did not raise a due process argument until after the case had been accepted by the Missouri Supreme Court and transferred back to the Court of Appeals. Petitioner had a clear and certain remedy in Mo. Rev. Stat. §139.031 (1986) to recover tax money paid to the city. Petitioner failed to avail itself of that remedy. The Petition for Writ of Certiorari should be denied.

I. THE WRIT SHOULD BE DENIED BECAUSE GM FAILED TO PROPERLY PRESERVE ITS CASE FOR APPEAL.

The Petition for a Writ of Certiorari should be denied as this Court has no jurisdiction over this matter as Petitioner failed to properly raise the federal question to bring this matter within the ambit of 28 U.S.C. §1257(a).

Petitioner had opportunity and reason to raise its due process argument at the trial court level, at the Missouri Court of Appeals, and at the Missouri Supreme Court. At each of these stages of litigation, the parties briefed the applicability of the tax protest provisions of Mo. Rev. Stat. §139.031 (1986) to the case at bar. Petitioner failed to raise any due process argument during the briefing and argument of this litigation and thus must be deemed to have waived the right to raise such argument. *Pruellage v.*

DeSeaton Corp., 380 S.W.2d 403 (Mo. 1964). In fact, Petitioner did not raise its due process argument until after the matter had been decided by the Missouri Court of Appeals, accepted by the Missouri Supreme Court and transferred the case back to the Court of Appeals with the mandate that the case be decided in light of *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. *banc* 1994). No Missouri appellate court had before it, nor did it consider, any due process argument.

Petitioner first raised its due process claim in a motion to supplement the record which was filed after the Missouri Supreme Court issued its mandate to the Court of Appeals that the case be decided in accord with *Armco*, 883 S.W.2d 3 which had just been decided.

Petitioner argues in its Petition that *Armco*, 883 S.W.2d 3 created a new and unexpected claim and that it raised the federal question at the earliest possible time thus bringing this matter within the Court's jurisdiction. However, the *Armco*, decision cannot be deemed to be completely unanticipated as the applicability of Mo. Rev. Stat. §139.031 (1986) had been briefed and argued. The Court lacks jurisdiction which Petitioner asserts exists by virtue of 28 U.S.C. §1257(a). *Herndon v. Georgia*, 295 U.S. 441 (1935) (Holding that the Supreme Court lacks jurisdiction to hear a federal question first presented in a motion for rehearing unless the claim could not have been anticipated in the original hearing). In *Armco*, 883 S.W.2d 3 the Missouri Supreme Court decided, as a matter of first impression, that the protest provisions of Mo. Rev. Stat. §139.031 (1986) applied to the municipal taxes. The Missouri courts had never before examined whether the protest provisions of Mo. Rev. Stat. §139.031 (1986)

applied to municipal taxes other than real property taxes. But the decision of *Armco*, 883 S.W.2d 3 certainly should not have been unexpected. Other taxpayers, such as the plaintiffs in *Armco*, 883 S.W.2d 3 paid municipal taxes under protest because the Mo. Rev. Stat. §139.031 (1986) protest provisions existed and had been in place for many years. The City in the trial court and in the Court of Appeals had certainly raised the issue which should have put Petitioner on notice that the possibility existed that Mo. Rev. Stat. §139.031 (1986) might apply to the taxes involved in this matter.

Petitioner's purported due process argument has never been an issue in this case. Petitioner failed to properly preserve its federal question by raising its constitutional argument at the earliest possible opportunity and keeping it alive through every stage in the proceeding; a federal question raised for the first time in a motion for rehearing is too late. *Pim v. St. Louis*, 165 U.S. 273 (1897). Since Petitioner failed to properly preserve its federal question, this Court lacks jurisdiction to grant the requested Writ.

II. PETITIONER'S CLEAR AND CERTAIN REMEDY EXISTS IN MO. REV. STAT. 139.031 (1986).

The clear and certain remedy for Missouri taxpayers to seek a refund of taxes has been found in Mo. Rev. Stat. §139.031 (1986) since 1969. *Armco*, 883 S.W.2d at 7. Petitioner argues that under *Reich v. Collins*, 513 U.S. ___, 115 S.Ct. 547 (1994), it has been denied a clear and certain remedy. *Reich* does not control the case at bar. In *Reich*, the Court set forth a two-prong test to determine the

legality of the matter presented. First, there must be a determination that the tax assessed was unlawful. Second, the taxpayer must be denied a remedy that was previously clear and certain, well settled law. In the case at bar, neither prong is satisfied.

Petitioner premises its due process argument on the ground that the court's order denied Petitioner the opportunity to pursue its remedy for an unconstitutional tax. Petitioner's argument must fail as there currently exists no binding determination of the unconstitutionality of the tax. The Court of Appeals' opinion filed on January 10, 1995, affirmed the trial court's grant of summary judgment to the City and found that "GM's recovery is barred by its failure to make or file a written protest at the times it paid the license taxes as required by §139.031 R.S.Mo." (Mo.App. Opinion, pp. 1-2). The trial court found the City's tax to be constitutional. No binding judicial determination exists which provides that the City's license fee violates any constitutional provision. So, even if Petitioner was allowed to make a due process argument at this late date, it must fail as the Missouri Court of Appeals affirmed the trial court's grant of summary judgment in favor of the City.

Even if the final order of the court found the tax as applied against Petitioner to be unconstitutional, the case at bar fails to meet the second prong of the *Reich* test. The clear and certain remedy available to Petitioner before *Armco*, 883 S.W.2d 3 was Mo. Rev. Stat. §139.031 (1986). The clear and certain remedy available to Petitioner after *Armco*, 883 S.W.2d 3 is still Mo. Rev. Stat. §139.031 (1986). No well settled law in Missouri has ever stated otherwise. *Armco*, 883 S.W.2d at 8.

Petitioner has not been denied what was previously known by well settled law to be an available remedy. As the Missouri Court of Appeals stated in its opinion filed on January 10, 1995:

> In *Armco*, the Supreme Court addressed an issue of first impression, interpreting §139.031 as it believed the legislature intended all along. *Armco*, 883 S.W.2d at 7-8. The court did not change an earlier interpretation on the issue of city tax collection; nor did the legislature enact a new statute which the court is attempting to apply retroactively. Parties are presumed to know the law and cannot normally avoid an act or deed on the ground that they were ignorant of the law. See *Shearin v. Fletcher/Mayo Associates*, 687 S.W.2d 198, 202 (Mo. App. 1984). GM had a duty to comply with §139.031. It failed to satisfy this duty and cannot now claim ignorance as an excuse.

Petitioner had available the remedy of paying its taxes under the Mo. Rev. Stat. §139.031 (1986) protest provisions prior to the *Armco* decision and after the *Armco* decision. Unlike the cases which Petitioner cites in its Petition, no clear statute was repealed, no matter of well settled law was changed. This was a matter of first impression in Missouri. It was not a "novel or unexpected" interpretation. A reasonably prudent taxpayer would have followed the Mo. Rev. Stat. §139.031 (1986). protest provisions. This is most clearly evidenced by the fact that other taxpayers, such as the plaintiffs in *Armco* did follow this statutory provision.

The application of the protest provisions of Mo. Rev. Stat. §139.031 (1986) to the case at bar does not give rise to a due process claim. The statutory language of Mo. Rev. Stat. §139.031 (1986) provides the clear and certain remedy the law requires. The fact that Petitioner failed to avail itself of this clear and certain remedy does not now give rise to a due process claim. *Campbell v. Olney*, 262 U.S. 352 (1923) (holding that one cannot claim denial of due process when one fails to avail himself of his opportunity to be heard).

CONCLUSION

The Petition for Writ of Certiorari should be denied as the Court has no jurisdiction over this matter because no title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States as required by 28 U.S.C. §1257(a).

Respecfully submitted,

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Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee On State Taxation ("COST") hereby respectfully requests leave to file a Brief as *Amicus Curiae* in Support of Petitioner. The interest of COST as *amicus curiae* is described *infra* at Brief, pp. 1-3. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondent has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this request.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning

the Due Process implications of the remedial scheme that has been configured by the Missouri courts in this case. A full exposition of the controversy and the potential ramifications of this case by each interested and eligible *amicus* is ultimately to the benefit of the Court in its administration of certiorari writs.

In fact, COST participated in this Court's review of the recent *Reich v. Collins* case as an *amicus* in support of the petitioner and presaged the Court's own conclusion: " 'Bait and switch' tax challenge schemes and remedial 'shell games' *ipso facto* violate both the spirit and substantive principles of Due Process." *Reich v. Collins,* Supreme Court No. 93-908, Brief of *Amicus Curiae* Committee On State Taxation, p. 8. COST's interest in the particular issues raised both by *Reich* and by this case continues unabated, and the sincerity of its efforts as an advocate of Due Process has been demonstrated.

Second, General Motors Corporation is but one of many member companies of COST that are concerned with the ability of state courts to interpret and administer remedial schemes in a manner designed to alleviate states' fiscal resposibility for unconstitutional taxing schemes. The behavior of Missouri State and municipal taxing jurisdictions toward their taxpayers is no less governed by this Court's enunciations of Due Process mandates applicable to remedial schemes than was the behavior of Georgia, the State that this Court directly forbade to engage in "bait and switch" tactics in *Reich v. Collins,* —— U.S. ——, 115 S.Ct. 547 (1994). COST has monitored the variety of tactics utilized by state courts for several years and is uniquely qualified to comment on the scheme in question.

Respectfully submitted,

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---

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consent of the petitioner has been obtained and filed with the Clerk of the Court; the Motion for Leave to File a Brief *Amicus Curiae* is made because the respondent has refused to likewise grant permission to file a brief.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorpo-

rated on December 11, 1991, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Many of COST's members are engaged in business in the State of Missouri and in the City of Kansas City, and thus have a particular interest in the ultimate settlement of the remedial landscape for taxes imposed by that municipality, as well as other Missouri municipalities. However, regardless of whether as individual entities they are subject to the taxing jurisdiction of the respondent, the entire membership of COST has a vital interest in ensuring that the mandates of this Court, informed by the Due Process principles of fairness and certainty, are observed by every court in every State of the union, insofar as such mandates impact the equitable tax treatment of business entities.

The clearest enunciation of such principles by this Court in many years was its ruling in *Reich v. Collins*, —— U.S. ——, 115 S.Ct. 547 (1994), wherein taxing jurisdictions were admonished without equivocation that "bait and switch" tactics would not be tolerated in the name of configuring a remedial scheme for unlawful taxation, albeit a scheme that will withstand constitutional scrutiny on its own merits. COST participated in this Court's review of the *Reich* case by submitting a brief as *amicus curiae* in support of the petitioner, and COST fully concurred in this Court's analysis and ruling. It is particularly disturbing, therefore, to see a significant moral victory for taxpayers be wilfully impugned by a state court so soon after the release of the *Reich* decision.

The Missouri courts have completely ignored this Court's Due Process precepts in their treatment of the petitioner, and COST's membership must fear that the literally unruly attitude demonstrated in this instance will pervade the State courts' jurisprudence in all remedial

matters impacting all types of taxes. Furthermore, if Missouri courts are permitted to disregard the supreme authority of this Court, what State will hesitate to do so in the future, particularly where the temptation is to craft holdings that retain unlawfully imposed but much-needed tax revenues? Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

The pressures on state courts to ignore Supreme Court precedent and reach an unconstitutional result in the cases before them may be derived from prevailing socio-cultural biases, as in the case of the historical resistance to racial desegregation of public schools, or they may be derived from fears concerning the integrity of the public fisc, as in the case of the state and local taxing jurisdictions' resistance to liability for refunds of unconstitutional taxes. These two scenarios are analogous in certain respects: (1) both involve the state courts' interpretation of state law, but also invoke constitutional due process principles; (2) both issues had or have been spoken to by this Court, and yet state courts continued (regarding racial integration of schools) and continue (regarding the sufficiency of remedies for unconstitutional taxes) to resist the mandates issued by this Court.

With respect to the requirement that public schools be open to all races—a critical due process and equal protection principle—this Court had to police its holding in *Brown v. Board of Education,* 347 U.S. 483 (1954) in the later case of *Harrison v. NAACP,* 360 U.S. 167 (1959). (Court recognized unfairness of permitting state courts to interpret state laws in such a manner as to impede integration and to nullify the effect of the *Brown* holding). With respect to the requirement that remedial schemes pertaining to state and local taxation satisfy due process—a critical requirement, since states have such flexibility in designing their remedial schemes—this Court is now called upon to police its holding in *Reich v.*

Collins in the instant case. Both the holding and strong message in *Reich*, and indeed the very supremacy of this Court, are thrown into question every time a state court chooses the course that Missouri's courts have elected in this case.

This Court should also be prepared not only to apply the *Reich* holding to this case, but also to extend the holding, if it deems the instant case to raise a new facet of the issue it decided in *Reich*. Each of the decisions that this Court has issued in the past ten years addressing the sufficiency of remedies for unconstitutional state and local taxes has built upon the foundations laid down in the prior case. This orderly evolution of case law in a complex and unique area of due process analysis, although gratifying to legal scholars in its own right, serves the much more pragmatic and therefore critical purpose of guiding the behavior and expectations of both taxpayers and taxing jurisdictions. This case presents the same qualifications for review by this Court as its predecessors.

ARGUMENT

I. THIS CASE RESONATES BEYOND THE JURISDICTION AND TAX IN QUESTION, AND POSES A DIRECT CHALLENGE TO THE DOCTRINE OF FEDERAL SUPREMACY AND THE SUPREME AUTHORITY OF THIS COURT TO ENUNCIATE CONSTITUTIONAL LAW

COST's broad membership base engages in business in every state jurisdiction and most municipal jurisdictions in this country. The implications of this case for COST's members and for all taxpayers are dire. From a narrow perspective, all businesses that are subject to taxation by any Missouri municipality that is currently imposing an unconstitutional tax are adversely affected by the Missouri Court of Appeals' interpretation of the tax protest statute. Like the petitioner, they will be foreclosed from obtaining refunds of unconstitutional taxes for all otherwise "open" years (*i.e.*, years for which the statute of

limitations has not run) if, like the petitioner, they reasonably understood the remedial scheme not to require payment under protest of such unconstitutional taxes.

From a broader perspective, this case presents a stand by state courts against United States Supreme Court precedent that is clearly attributable to the courts' percepion that the ruling in question will potentially impair the state's fisc. This Court recently stated, in *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* No. 94-688, 115 S.Ct. 2351 (June 19, 1995), that it has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." Slip Op. at 3. However, the deference accorded to taxing jurisdictions, with respect to the means by which revenues to carry on governmental functions are obtained, ceases to inform this Court's jurisprudence where the taxing jurisdiction in question does not satisfy the requirements of due process. Admittedly, the root due process requirements are flexible—"the [taxing jurisdiction] may determine whether to provide pre-deprivation process (*e.g.*, an injunction) or instead to afford post-deprivation relief (*e.g.*, a refund)." *Truck Council,* slip op. at 4. Nevertheless, as this Court also recently stated in *Reich v. Collins,* what a state "may not do, . . . is hold out what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich,* 115 S. Ct. at 548.

The operative facts, analysis and holding in *Reich* are, if not identical, clearly related to the case at hand. Neverthless, the Court of Appeals and the Supreme Court of Missouri refused in three separate instances to either reconsider the case or entertain an appeal in light of *Reich.* The State courts' refusal to consider the application of *Reich* in this case, concomitantly with the Court of Appeals' dismissal of the apparently "clear and certain" post-

deprivation challenge which the petitioner had chosen to pursue, constitutes the same sort of "bait and switch" tactics that due process forbids. Permitting state courts to flaunt any ruling of this Court, but particularly one so recently issued and one so hard-fought-and-won by taxpayers, is anathema to the doctrine of federal supremacy and the axiom that this Court is supremely authorized to interpret and apply the laws governing the behavior of all governmental bodies, whether federal, state or municipal.

II. AS *REICH* REQUIRED THIS COURT TO EXTRAPOLATE FROM ITS REMEDIAL JURISPRUDENCE IN *HARPER*, THIS CASE NECESSITATES THE APPLICATION AND POSSIBLE EXTENSION OF THE HOLDING IN *REICH*

The judicial deference that this Court extends to taxing jurisdictions often combines with the Court's use of the narrowest grounds available for decision; additionally, the parties to a case may not properly present the complete assemblage of issues for decision by this Court that are derived from the applicable facts and legal principles. Thus it is that several recent state tax cases decided by this Court have provided guidance to taxpayers on one issue, but have left corollary or secondary questions unanswered which must be posed to the Court in subsequent controversies. For example, *Harper v. Virginia Dept. Of Taxation*, —— U.S. ——, 113 S.Ct. 2510 (1993), addressed the post-*Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803 (1989), issue of whether this Court's decisions announcing rules of federal law in civil cases must have retroactive effect. This Court acknowledged but did not resolve the derivative issue of what constitutes an appropriate remedy for unconstitutional taxes in *Harper*. However, the Court granted certiorari in *Reich v. Collins* (for the second and final time) on the post-*Harper* question of what constitutes a "clear and certain" remedy for unconstitutional taxes, by reference

to *Harper* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990). That particular question remains unanswered in the form it was posed, because *Reich* was ultimately decided on the grounds that due process was not satisfied by State's "bait and switch" tactics where a remedial procedure at least *appeared* to be available at the time the taxpayer chose to pursue it.

Nevertheless, the decision in *Reich* represented another step forward in the orderly evolution of this Court's state and local tax remedial jurisprudence. Today the Court considers the Petition of a taxpayer who has found that *Reich* either (1) resolves its dilemma, but is being ignored by the taxing jurisdiction and the State courts to which the taxpayer posed the case, or (2) requires this Court's analysis and extrapolation of the principles enunicated in *Reich* to resolve an important question of law that is naturally derived from *Reich* and that will continue to arise if not confronted. As this Court has done with the precedent cases of *Harper* and *Reich,* so it should grant certiorari in this case to both further the relevant analytic process and acknowledge the practical ramifications of the various unanswered questions, loose ends and "loopholes" that this line of cases continues to generate.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of ceriorari and reverse the decision of the Missouri Court of Appeals, or, in the alternative, vacate and remand the case for reconsideration in light of *Reich.*

Respectfully submitted,

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PETITIONER'S REPLY MEMORANDUM

The brief in opposition filed by the City of Kansas City, Missouri advocates form over substance and fiscal expediency over fundamental fairness. It thus illustrates why this Court must grant certiorari if the federal constitutional rights of General Motors Corporation and other taxpayers are to be preserved as the supreme law of the land.

1. The City's jurisdictional argument ignores this Court's precedents and distorts the history of this case.

GM has already demonstrated that it properly preserved its federal constitutional claim in accordance with prior decisions of this Court involving comparable facts

(Pet. 8-10), and the City makes no attempt to distinguish those cases. Nevertheless, the City argues GM did not timely present its due process claim to the Missouri courts because GM first raised it after the Missouri Supreme Court decided as a matter of first impression that a Missouri tax protest statute, Mo. Rev. Stat. § 139.031, applies to municipal taxes. *Armco Steel v. City of Kansas City,* 883 S.W.2d 3 (Mo. banc 1994). According to the City, GM should have foreseen the *Armco* decision years in advance and raised a due process claim beginning in the trial court. To the contrary, there is no requirement that a party present hypothetical and speculative constitutional claims. The facts show that GM acted promptly to protect its federal constitutional rights as soon as they were placed in jeopardy by the unprecedented actions of Missouri courts.

GM's due process rights were not deprived by the trial court or by the court of appeals prior to the *Armco* decision. Both of those courts determined that section 139.031 did not apply to municipal taxes and that a common law remedy was available. These decisions were consistent with the statutory framework and available precedents. Pet. 5-6, 13-14.

The earliest indication of any due process issue came only after GM had prevailed on its Commerce Clause argument before the court of appeals. On August 15, 1994, the Missouri Supreme Court issued its decision in *Armco* and simultaneously retransferred this case to the Missouri Court of Appeals for reconsideration. The City departs from the record when it asserts that "the Missouri Supreme Court issued its mandate to the Court of Appeals that the case be decided in accord with *Armco.*"

Brief Opp. 5. In reality, the supreme court merely remanded for reconsideration without dictating any particular outcome in this case. Pet. App. 11a. For example, the *Armco* decision did not declare section 139.031 to be an exclusive remedy or otherwise address the continued availability of a common law refund action.

GM immediately raised its due process claim by filing a motion on September 8, 1994 with the court of appeals, where the case was then pending. Pet. App. 76a-83a. GM argued that retroactive application of *Armco* would violate GM's due process right to a clear and certain remedy and would be contrary to this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Pet. App. 78a-82a. GM moved to brief and argue this issue, but the court of appeals rejected GM's request. Pet. App. 42a-43a. After the court of appeals issued its second opinion, GM reasserted its due process argument by motion for rehearing to the court of appeals and by application to transfer to the supreme court. Pet. App. 48a-75a. Both courts refused to consider the issue or this Court's newly-issued decision in *Reich v. Collins*, 115 S. Ct. 547 (1994). Pet. App. 40a-41a.

Thus, GM has promptly and repeatedly asserted its federal constitutional claim,but the Missouri courts have chosen to disregard the due process issue and this Court's pronouncements. At a minimum, this Court should grant certiorari in order to vacate and remand this case to the Missouri Court of Appeals with directions to address GM's constitutional argument and cases such as *Reich* and *McKesson*. The Court has taken similar action in several recent taxation cases where state courts have been

reluctant to address taxpayer arguments that threaten governmental fiscal interests. *See, e.g., Reich,* 115 S. Ct. at 549-50; *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510, 2514-16 (1993).

2. The City's effort to distinguish and limit *Reich* demonstrates continuing disregard of the supreme federal law and confirms the need for action by this Court.

The City first attempts to limit *Reich* by arguing there is no currently existing determination that the City's occupation license tax violates the Commerce Clause. This argument exalts form over substance because the Commerce Clause issues were litigated and decided in GM's favor before the *Armco* decision. In essence, the City argues GM has no remedy for a denial of due process so long as a state employs bait-and-switch tactics that prevent a decision favorable to the taxpayer from becoming final or that otherwise permit a state court to avoid reaching the merits of a taxpayer's claim. Properly construed, *Reich* condemns bait-and-switch tactics of all kinds without regard to the particular timing or technique employed.

Second, the City argues that *Reich* only applies where a taxpayer is "denied a remedy that was previously clear and certain, well settled law." Brief Opp. 7. Although it might appear from this premise that the City is prepared to argue that a state is free to maintain a misleading or confusing remedial scheme (such as existed here), the City instead repeatedly asserts that section 139.031 has always been a clear and certain remedy applicable to municipal taxes. This argument ignores the contrary interpretation of section 139.031 issued by courts in this very case as well as the City's contradictory positions in

Armco and this case. After arguing in *Armco* that section 139.031 did not apply to municipalities and that taxpayers had no right to pay under protest, the City now argues that GM should have done precisely that. Equally contradictory is the City's suggestion that a taxpayer's remedy can be well settled prior to being declared as a matter of first impression. Finally, even assuming section 139.031 could somehow be regarded as a clear and certain remedy, it was never regarded as exclusive and the City offers no justification for the denial of GM's pre-existing common law remedy.

CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted. Because the record plainly demonstrates Missouri courts have refused to abide by the supreme federal law, the case may be appropriate for summary disposition, either reversing the judgment outright or vacating and remanding with directions to consider GM's due process claim in light of this Court's controlling precedents.

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No. 95-125

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

CITY OF KANSAS CITY, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Western District

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FILED BY COMMITTEE ON STATE TAXATION

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The Motion for Leave to File Brief Amicus Curiae filed by the Committee on State Taxation (hereinafter "Applicant") should be overruled as it fails to bring forth any relevant matter, facts or questions of law which have not already been presented by the parties. Rather, this is merely a transparent attempt on the part of Petitioner to file two briefs in this matter as Petitioner is a member company of the Committee on State Taxation.

Supreme Court Rule 37 governs the filing of briefs amicus curiae and in relevant portion states:

> .1. An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.
>
> .2. A brief of an *amicus curiae* submitted prior to the consideration of a petition for a writ of certiorari . . . A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored.

Applicant's Motion for Leave to File Brief *Amicus Curiae* and brief submitted in favor of Petitioner's Petition for a Writ of Certiorari fails to meet the standard set forth in Rule 37 and therefore, should be overruled.

The true purpose of Applicant's request to file brief *amicus curiae* in support of Petitioner is found on page two of the Motion which states: "Second, General Motors Corporation is but one of many member companies . . . " The purpose of this motion is not to bring relevant matter to the attention of the Court which has not already been brought to its attention by the parties. Rather, this motion is a transparent attempt by General Motors Corporation to burden the Court by filing two sets of briefs on its behalf.

Applicant raises no relevant matter which the parties have not already raised. Applicant's motion merely restates the same legal arguments which Petitioner raised in its Petition. Furthermore, Applicant misstates the law of Missouri by stating that Missouri taxpayers have been "foreclosed from obtaining refunds of unconstitutional

taxes" (App. Brief, p.4) when in fact the clear and certain remedy for seeking a refund of taxes in Missouri has been available and has been unchanged for many years. Applicant premises its argument on the conclusion that the tax asserted against Petitioner is unconstitutional; the law of the case as it currently stands does not support this premise as there is no binding court opinion finding the tax to be unconstitutional. These are the same arguments Petitioner makes in its Petiton.

Applicant brings no relevant matter to the attention of the Court that has not already been brought to its attention by the parties. Applicant's Motion should be overruled.

Respectfully submitted,

CITY OF KANSAS CITY,
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